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OF THE

UNITED STATES.

MR. JUSTICE HUNT, *by reason of indisposition, took no part in deciding the cases reported in this volume.*

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United States. Supreme Court.

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SUPREME COURT.

VOL. 101.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1879.

REPORTED BY

WILLIAM T. OTTO.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD.	HON. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. STEPHEN J. FIELD.
HON. WILLIAM STRONG.	HON. JOSEPH P. BRADLEY.
HON. WARD HUNT.	HON. JOHN M. HARLAN.

ATTORNEY-GENERAL.

HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

As made April 22, 1878, under the Acts of Congress of July 23, 1866, and March 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
Hon. M. R. WAITE, Ohio.	Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	Jan. 21. President Grant.
ASSOCIATES.	FIRST.	1858.
Hon. N. CLIFFORD, Maine.	Maine, New Hampshire, Massachusetts, and Rhode Island.	Jan. 12. President Buchanan.
	SECOND.	1872.
Hon. WARD HUNT, New York.	New York, Vermont, and Connecticut.	Dec. 11. President Grant.
	THIRD.	1870.
Hon. WM. STRONG, Pennsylvania.	Pennsylvania, New Jersey, and Delaware.	Feb. 18. President Grant.
	FIFTH.	1870.
Hon. J. P. BRADLEY, New Jersey.	Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	March 21. President Grant.
	SIXTH.	1862.
Hon. N. H. SWAYNE, Ohio.	Ohio, Michigan, Kentucky, & Tennessee.	Jan. 24. President Lincoln.
	SEVENTH.	1877.
Hon. J. M. HARLAN, Kentucky.	Indiana, Illinois, and Wisconsin.	Nov. 29. President Hayes.
	EIGHTH.	1862.
Hon. S. F. MILLER, Iowa.	Minnesota, Iowa, Missouri, Kansas, Arkansas, Nebraska, and Colorado.	July 16. President Lincoln.
	NINTH.	1863.
Hon. S. J. FIELD, California.	California, Oregon, and Nevada.	March 10. President Lincoln.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1879.

NATIONAL BANK *v.* UNITED STATES.

1. Sect. 3413 of the Revised Statutes, which enacts that "every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them," is not unconstitutional.
2. The tax thus laid is not on the notes, but on their use as a circulating medium.
3. *Veazie Bank* v. *Fenno* (8 Wall. 533) cited and approved.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This is a suit by the United States to recover from the Merchants' National Bank of Little Rock, Ark., $160,000, being ten per cent on $1,600,000 of certain notes of the City of Little Rock, which it was alleged the bank had paid out during the years 1870, 1871, 1872, and 1873. The notes were issued and put in circulation by the city, and used in business and commercial transactions as money. They were printed on bank-note paper in amounts ranking from $1 to $100, and were payable to a person named or to bearer. By an ordinance of the city, and also by an act of the legislature of the State, they were receivable in payment of city taxes and of all dues to the city.

Sect. 3413 of the Revised Statutes is as follows: "Every national banking association, State bank, or banker, or asso-

ciation, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them."

There was a verdict in favor of the United States for $2,000; and judgment thereon having been rendered, the bank thereupon sued out this writ of error.

Mr. B. C. Brown for the plaintiff in error.

So far as it seeks to impose a tax by the United States upon the circulation or other use of the notes of a State municipal corporation, the statute in question is unconstitutional and invalid.

The principle to which the plaintiff in error appeals is well settled.

In our dual government, each — State and Federal — is supreme in its own sphere. Each, in all its departments, may devise and use its own means for the discharge of its duties and the exercise of its powers, without hindrance from the other. Neither may, directly or indirectly, by taxation or otherwise, impede the other in the use of such means. *McCullough* v. *The State of Maryland*, 4 Wheat. 316; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Dobbins* v. *Commissioners of Erie County*, 16 id. 435; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Bradley* v. *The People*, 4 id. 459; *The Banks* v. *The Mayor*, 7 id. 16; *Bank* v. *Supervisors*, id. 26; *The Collector* v. *Day*, 11 id. 113; *United States* v. *Railroad Company*, 17 id. 322; *Freedman* v. *Sigel*, 10 Blatch. 327; *State* v. *Garton*, 82 Ind. 1; *Jones* v. *Keep*, 19 Wis. 369; *Sayles* v. *Davis*, 22 id. 229; *Fifield* v. *Close*, 15 Mich. 505; *In the Matter of Georgia*, 12 Op. Att.-Gen. 282.

A municipal corporation is a part of the State government, and is protected from Federal taxation to the same extent and in the same manner as the State itself. *United States* v. *Railroad Company*, *supra*.

This principle cannot be denied, but the United States will contend that it does not relieve the bank from payment of the tax.

That the tax is laid upon the municipality's notes and evidences of indebtedness, or rather upon it, cannot be denied.

In determining whether a tax falls within the prohibition, its effect must be considered, and is decisive. In *Railroad Company* v. *Peniston* (18 Wall. 5), the exemption of Federal agencies from State taxation was said to be dependent "upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." p. 86.

The effect of the tax in this case is apparent. The tax is more burdensome than any which has ever come before the court for determination. In all former cases, the tax was a single specific one, ending on payment. This is a continuing one, following the city's note wherever it may go, and never ending or ceasing until the city abandons the attempt to exercise its legitimate powers. In ten transfers, the national government absorbs the whole value of all the notes issued by the city. Each taker from the city must consider not only the tax which he must pay, but also that which must be paid by the person who takes it from him; for by each transfer, in exchange for the obligations of the government, or of private persons, or for articles purchased or in payment of debts, the note, whether it be taken at a discount or a premium, or at par, is "paid out," within the meaning of the act imposing this tax.

The case most nearly analogous to this is *Weston* v. *City Council of Charleston*, *supra*. The "stock" of the United States and these "notes" are similar in every respect. Each was the evidence of a governmental debt, contracted in the exercise of the borrowing power. It is a mistake to call this a tax upon the bank. The bank may be the paying agent, just as in *United States* v. *Railroad Company*, *supra*. There the railroad company was the paying agent, but the tax, when paid, fell upon Baltimore. In this it falls upon Little Rock. The only material difference between *Weston* v. *City Council of Charleston* (*supra*) and the case at bar is, that there the tax was imposed directly upon the stock, while here the attempt is to arrest the city's notes in their circulation, and prevent their passing from hand to hand, by affixing a tax upon their transfer. The contention by the United States

that this is not a tax upon the note is to argue that the national government may do indirectly what it cannot do directly. The argument has been frequently met and answered by this court. In the case last cited it was admitted that the power of the government to borrow money could not be directly opposed; but a distinction was taken, in argument, between direct opposition and those measures which had ultimately the same effect. The distinction was promptly repudiated by the court.

If this is a tax which affects the notes of the city directly or indirectly, it must be condemned; and that it is such there can be no doubt. For it is the quality of transfer — of passing from hand to hand — which gives their chief value to the notes or evidences of debt which are issued by the United States or the smallest municipality. To say that Congress cannot tax the paper, and yet may destroy the quality which gives it value, is an evasion unworthy of any government.

As to the power of taxation, the rights and regulations of the national and State governments are strictly correlative. Each, as to the other, possesses the same rights and is bound by the same restraints. If, without the power to tax the notes, Congress may arrest their circulation by imposing a tax upon the act of paying them out, the States may, with the same right, impose a tax upon the act of paying out the national currency, or upon the transfer of national obligations. If the power exists upon one side, it does upon the other, and the States may destroy the value of the notes or other obligations of the national government, just as the United States, in this case, destroyed the value of the notes of Little Rock.

It is said that the national banks being the creatures of Congress, that body can impose upon them any prohibition, or grant to them any privilege, — enforce the prohibition by any penalty, or affix to the exercise of the privilege any price; that the plaintiff in error, having violated the prohibition, must incur the penalty, or, having exercised the privilege, pay the price. That argument does not affect this case, for the reason that Congress neither imposed a prohibition upon, nor granted a privilege to, national banks, in regard to the matter in question. What it might have done, or could have

done, is not for consideration here. The question is, What was done?

It seems clear that the argument of prohibition or privilege gains nothing from the fact that the plaintiff in error is a national banking association, deriving its powers from the act of Congress. While such associations are named, the tax is not imposed upon them as a distinct class, but is intended to suppress the circulation and transfer of the notes of municipal corporations. If that effort cannot be sustained as to the other corporations and persons named in the act, it must fail as to all, national banks included.

Penalties are never implied. They must be directly prescribed by clear words, for courts will never find them by implication. The act contains neither prohibition, penalty, nor privilege, and taxation implies neither. *Youngblood* v. *Sexton*, cited in Cooley on Taxation, 404; *McGuire* v. *The Commonwealth*, 8 Wall. 382; *Pervear* v. *The Commonwealth*, 5 id. 475.

Veazie Bank v. *Fenno* (8 Wall. 533), which upheld a statute imposing a similar tax upon the paying out of the notes of a State bank, presents a very different question. It is true, as argued in that case, that the franchise of the Veazie Bank was granted by a statute, but it was granted to private persons and for private purposes. The notes of the bank were issued for mere trading purposes. The notes of Little Rock were the evidences of a debt, contracted for public uses by a branch of the State government; and formed a part of the debt of the State. A tax upon them in any form is a tax upon the government of the State.

The Solicitor-General, contra, cited *Veazie Bank* v. *Fenno*, 8 Wall. 533.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question presented is as to the constitutionality of sect. 3413 of the Revised Statutes, the objection being that the tax is virtually laid upon an instrumentality of the State of Arkansas.

We think this case comes directly within the principles settled in *Veazie Bank* v. *Fenno* (8 Wall. 533), where it was

distinctly held that the tax imposed by that section on national and State banks for paying out the notes of individuals or State banks used for circulation was not unconstitutional. The reason is thus stated by Mr. Chief Justice Chase: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." p. 549.

The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.

Judgment affirmed.

BABBITT v. FINN.

A., against whom a judgment in favor of B. was rendered in the District Court, sued out of the Circuit Court a writ of error which was a *supersedeas*, by his giving the requisite bond. The judgment having been affirmed, another bond for a *supersedeas* was executed and the cause removed here. The judgment of the Circuit Court was affirmed. The original judgment remaining unpaid, this action against the sureties to the first bond was brought. *Held*, 1. That their liability was fixed by the judgment of the Circuit Court, and was not diminished by the subsequent proceedings. 2. That they are not chargeable with the costs incurred by reason of those proceedings. 3. That the issue of an execution against A. was not essential to B.'s right to recover.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

March 27, 1872, James C. Babbitt, assignee in bankruptcy of E. Miller, recovered, in the District Court of the United States for the Western District of Missouri, a judgment for $4,236.28, against Edward Burgess, who, on the 29th of that month, sued out of the Circuit Court a writ of error, and executed the requisite bond, with sureties, to render it a *supersedeas*.

This action was brought by Babbitt against John Finn and John Shields, who were such sureties. The breach assigned in the declaration is that "said Burgess did not prosecute said writ to effect, nor answer all or any damages or costs on failing to make good his said plea; but that said cause came on to be heard in said Circuit Court during the March Term, A.D. 1873; said Circuit Court, on the twenty-second day of March, 1873, ordered and adjudged that the said judgment of said District Court be, and the same was thereby, affirmed with costs;" "that afterwards the said record of said cause was taken from said Circuit Court to the Supreme Court of the United States on a writ of error; on the 25th of October, 1875, it was duly ordered and adjudged by said Supreme Court that the said judgment of said Circuit Court be, and the same was thereby, affirmed with costs, and that the said Babbitt, as such assignee, recover against the said Burgess $107.35 for his costs expended in said cause in said Supreme Court."

The declaration further alleges that said judgment of said

District Court is still in full force and effect, and is wholly unpaid and unsatisfied, &c.

The defendants filed a demurrer, which was overruled. They then answered, admitting the execution of the bond and the first judgment of affirmance, and setting up that Burgess subsequently gave a new *supersedeas* bond, and removed the case to this court, where the judgment of the Circuit Court was affirmed; and that by such second bond "the judgment of said Circuit Court was superseded, rendered inoperative, and vacated, and defendants were for ever released and discharged from any and all liability upon said bond sued on."

For a further defence, they averred that the plaintiff had not sued out an execution against Burgess, or pursued the sureties on the second bond, they being solvent.

To these affirmative defences the plaintiff demurred. His demurrer was overruled. The plaintiff then filed a replication, denying the new special matter set up. The court rendered judgment for the defendants. The plaintiff then removed the case here.

Mr. Nathaniel Myers for the plaintiff in error.

1. The admission in the answer of the execution and breach of the bond entitled the plaintiff to a judgment in his favor, on the pleadings, unless the special matter pleaded by the defendants constituted a valid defence.

2. The affirmance by the Circuit Court of the judgment of the District Court fixed the liability of the sureties, and was a breach of the condition to prosecute the writ of error with effect. *Karthaus* v. *Owings*, 6 Har. & J. (Md.) 134.

3. The second writ of error did not annul that affirmance, or discharge the sureties on the original *supersedeas* bond. *Dolby* v. *Jones*, 2 Dev. (N. C.) 109; *Ashby* v. *Sharp*, 1 Litt. (Ky.) 156; *Jordan* v. *Agawam Woollen Co.*, 106 Mass. 571; *Hinckley* v. *Kreitz*, 58 N. Y. 583; *Smith* v. *Falconer*, 11 Hun (N. Y.), 481; *Gillette* v. *Bullard*, 20 Wall. 571; *Smith* v. *Crouse*, 24 Barb. (N. Y.) 433; *Richardson* v. *Krapf*, 5 Daly (N. Y.), 385; Rev. Stat., sect. 1000; *Gardner* v. *Barney*, 24 How. (N. Y.) Pr. 467; *Robinson* v. *Plimpton*, 25 N. Y. 484; *Kellar* v. *Williams*, 10 Bush (Ky.), 216; *Brandenburg* v. *Flynn's Administrator*, 12 B. Mon. (Ky.) 399; *Patterson* v. *Pope*, 5 Dana (Ky.), 241.

4. It was not necessary to sue out an execution against the original judgment debtor. *Smith* v. *Ramsay*, 6 Serg. & R. (Pa.) 578; *Wood* v. *Derrickson et al.*, 1 Hill (N. Y.), 410; *Tissot* v. *Darling*, 9 Cal. 278; *Smith* v. *Gaines*, 93 U. S. 841; Brandt, Sureties, sect. 404.

Mr. Given Campbell, contra.

The only question for consideration is, Did the court err in rendering judgment in favor of the defendants? and it is submitted on their behalf that it did not. The new bond when the writ of error was sued out of this court operated as a *supersedeas*, and discharged the sureties on the bond given in the District Court.

Such a bond is intended to secure the payment of the judgment, if the defendant fails in the Appellate Court. Rule 29, Sup. Court; *Evans* v. *Hardwick*, 1 J. J. Marsh. (Ky.) 435; *Morris* v. *Barclay*, *&c.*, 3 id. 876; *Moore* v. *Gorin*, 2 Litt. (Ky.) 186; *Sumrall et al.* v. *Reid*, 2 Dana (Ky.), 65.

It is with this view that it is required to be in double the amount of that judgment. *Shannon and Wife* v. *Spencer*, 1 Blackf. (Ind.) 120; *Norwood* v. *Martin*, 3 Har. & John. (Md.) 199; *Parker* v. *Hannibal & St. Jo Railroad Co.*, 44 Mo. 415.

This court must have had in view the fact that at common law, sureties were not liable beyond the court for which they stipulated, or the fourth and tenth rules in admiralty would not have been so carefully framed.

The judgment of the Circuit Court, so far as it affected the defendants as sureties on the first bond was vacated by the subsequent proceedings, *Payne* v. *Cowan*, 17 Pick. (Mass.) 142; and an action of debt could not be maintained upon it. *Atkins* v. *Wyman*, 45 Me. 399; *Campbell* v. *Howard*, 5 Mass. 376; *Keen* v. *Turner*, 18 id. 266; *State of Ohio* v. *Commercial Bank of Cincinnati*, 7 Ohio, 129; *Clark Gale* v. *R. Butler, Jr.*, 35 Vt. 449.

The original bond was not given to secure the judgment of the Circuit Court when the cause was removed here. If that bond remained in force, another in double the amount of that judgment should not be required, as no additional security, except for costs, would be necessary to transfer the case here,

and stay proceedings during its pendency. Such is the course in many of the circuits, in admiralty appeals, where stipulations have been taken under rules 4 and 10.

After the second bond had been approved and a *supersedeas* allowed, the Circuit Court had no longer the judgment in its power. That bond stayed all proceedings, and precluded the first bondsmen from fulfilling the condition of their bond.

Where property seized on execution has been released upon a forthcoming bond, and before the day of sale mentioned in that bond an appeal is taken, a bond for its due prosecution discharges the sureties on the forthcoming bond.

A forthcoming bond discharges the lien arising from the levy of an execution. *Brown* v. *Clark*, 4 How. 4; Freeman, Judgments, sects. 380, 381.

The bond given for the release of an attachment discharges the property from the lien of that writ. *St. Louis Perpetual Insurance Co.* v. *Ford*, 11 Mo. 295; *Suydam* v. *Huggeford*, 23 Pick. (Mass.) 465.

In admiralty, a vessel libelled upon a lien claim is discharged from the lien when the requisite bond is delivered. The latter is a substituted security, taking the place of the vessel. A bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty is, in the subsequent proceedings, a substitute for the property. *United States* v. *Ames*, 99 U. S. 772. A second replevin bond given and accepted discharges the first. *Chancellor* v. *Van Hook & Brooking*, 2 B. Mon. (Ky.) 447.

These analogous cases are cited because authority upon the exact question under consideration is not abundant. It is elementary learning, however, that there are no presumptions against the defendants who, as sureties, have the right to stand upon the very letter of their contract. A change for their benefit without their consent releases them. Their obligation vanishes with that of their principal, and their undertaking was that he should be good for the judgment when rendered in the Circuit Court, and that if he did not pay it then, or otherwise indemnify and satisfy the plaintiff, they would do so for him. When he gave his bond for a writ of error and a *supersedeas* to this court, he did indemnify the plaintiff to his satis-

faction, and secured the debt evidenced by that judgment. In consideration of such indemnity and security, Burgess was allowed to have his cause heard here, and all proceedings to enforce the judgment were stayed.

It cannot be successfully contended that the defendants are to be regarded as sureties to the plaintiff for the solvency of the sureties on the subsequent bond, or for the continuing solvency of their principal. They might be willing to underwrite his solvency until his cause should be decided in the Circuit Court, but not for two years longer, when the action would be pending in this court.

Such an extension of their liability would be making a new and more onerous contract for them. It seems, therefore, that the bond for the writ of error from this court is substituted for that originally given, and exempts these defendants from liability.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Notice to the opposite party is required in every case when a writ of error is sued out or an appeal is taken to remove a cause into an appellate court, except when the appeal is allowed in open court; and the provision is that every justice or judge signing the citation, except in certain cases not material to mention, shall take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect; and if he fail to make his plea good, that he shall answer all damages and costs where the writ is a *supersedeas*, or all costs only where it does not supersede the execution. Rev. Stat., sect. 1000.

It appears that the plaintiff as an assignee in bankruptcy recovered judgment in the District Court against Edward Burgess in the sum of $4,236.28 debt, and costs of suit. Exceptions were filed by the defendant, and he sued out a writ of error and removed the cause into the Circuit Court for the same district to reverse the judgment. Sureties to the bond were required to perfect the removal of the cause, and the defendants in the present suit signed the bond as sureties of the principal, who is the party that sued out the writ of error.

Sufficient appears to show that the bond was duly approved and the writ allowed, and that the cause was removed into the Circuit Court for trial. Due notice was given to the plaintiff, and it appears that the parties were there heard and that the Circuit Court affirmed the judgment of the District Court, with costs. Payment of the judgment having been refused, and it appearing that the debtor had no property wherewith to satisfy the execution, the judgment creditor, as plaintiff, instituted the present suit against the defendants as the sureties of the principal, counting on the said bond as the cause of action.

None of these facts are controverted, and it appears that the plaintiff in his declaration assigned as a breach of the bond that the principal in the same did not prosecute his writ of error to effect nor answer all or any damages or costs on failing to make his plea good. Service was made; and certain proceedings followed that it is not important to notice, subsequent to which the defendants filed an answer, in which they set up the defence that the defendant in that suit by writ of error removed the judgment of the Circuit Court into the Supreme Court, and gave a new *supersedeas* bond, with good and sufficient sureties, to prosecute the appeal to the last-named court to effect; and the defendants here aver that by force and effect of said last-named writ of error and bond the judgment of the Circuit Court was superseded, rendered inoperative, and vacated, and that the defendants in that bond thereby became released and discharged from any and all liability on the bond which they signed as sureties for their principal, it appearing that the sureties on the last-named bond are solvent, and that the bond is sufficient in amount to answer all damages and costs.

Responsive to those affirmative defences the plaintiff filed a demurrer to the affirmative defences set up in the answer, which was overruled by the court. Failing in that, the plaintiff filed a replication denying the new matters set up in the answer, and the court, on motion of the defendants, rendered judgment in their favor. Exceptions were filed by the plaintiff, and he sued out the present writ of error.

Three errors are assigned in this court: 1. That the Circuit Court erred in overruling the plaintiff's demurrer to the affirmative defences set up in the answer. 2. That the court erred

in rendering judgment for the defendants. 3. That the court erred in not rendering judgment for the plaintiff.

Argument to show that the bond given in the District Court to prosecute the appeal to effect and answer all damages and costs was sufficient in form is unnecessary, as nothing is suggested to the contrary; nor is it necessary to enter into any discussion to prove that the omission of the names of the sureties in the introductory part of the bond does not affect its validity, inasmuch as it appears that each signed and sealed the instrument. *Pequawkett Bridge* v. *Mathes*, 7 N. H. 230; *Martin* v. *Dorteh*, 1 Stew. (Ala.) 479; *Johnson & Cain* v. *Steamboat Lehigh*, 13 Mo. 539; Brandt, Sureties, sect. 15; *Cooke* v. *Crawford*, 1 Tex. 9.

Judgment was affirmed in the Circuit Court, and the rule is universal that the affirmance of the judgment in the Appellate Court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect. *Karthaus* v. *Owings*, 6 Har. & Johns. (Md.) 134, 139.

Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. *Dolby* v. *Jones*, 2 Dev. (N. C.) L. 109; *Ashby* v. *Sharp*, 1 Litt. (Ky.) 156; *Robinson* v. *Plimpton*, 25 N. Y. 484; *Smith* v. *Falconer*, 11 Hun (N. Y.), 481; *Gardner* v. *Barney*, 24 How. (N. Y.) Pr. 467–469; *Smith* v. *Crouse*, 24 Barb. (N. Y.) 433.

Sureties in a bond for an appeal from the special term to the general term are fixed in their liability when the judgment rendered in the special term is affirmed at the general term, but such sureties are not liable for costs in the appeal from the general term to the Court of Appeals, as the costs of such an appeal are not within the undertaking of the sureties in a bond given to prosecute the appeal from the special term to the general

term, from which it follows that the sureties in the bond to prosecute the appeal from the general term to the Court of Appeals are alone responsible for such costs, without any claim for contribution from the sureties in the bond given to prosecute the appeal from the court of original jurisdiction to the general term: *Hinckley* v. *Kreitz*, 58 N. Y. 583, 587.

Viewed in the light of these suggestions, it is clear that the sureties in the bond given to prosecute the removal of the cause in this case from the District Court to the Circuit Court became fixed when the judgment rendered in the District Court was affirmed; nor did the removal of the judgment of affirmance rendered in the Circuit Court into the Supreme Court have any effect whatever to diminish the liability of those sureties. Certainly not, as the judgment rendered in the Circuit Court was affirmed in the Supreme Court.

Judgment having been rendered against the principal in the bond in the District Court, and the condition of the bond being that he, the principal, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, it is difficult to see how it can be held that the sureties are discharged when it is held both in the Circuit Court and the Supreme Court that the judgment of the District Court is correct and that the judgment should be affirmed. Neither principle nor authority will support that theory, nor do they afford it any countenance whatever. *Jordan* v. *Agawam Woollen Co.*, 106 Mass. 571.

Suppose that is so, still it is contended by the defendants that they are not liable in a suit on the bond because the plaintiff did not as a preliminary proceeding sue out an execution on the judgment and take proper steps to make the money. Without more, the condition of the bond is a sufficient answer to that defence, as it stipulates that if he, the principal, fails to make his plea good, the obligors, principal and sureties, shall answer all damages and costs, which is quite enough to show that it was not necessary that an execution should be sued out on the judgment before a right of action would accrue to the judgment creditors to enforce their remedy on the bond. As between the obligors and obligees all the obligors are principal debtors, though as between each other they may have the rights

and remedies resulting from the relation of principal and surety.

It was the affirmance of the judgment that fixed the liability, and inasmuch as the defendants bound themselves that the principal should pay the judgment if he failed to make his plea good, no such preliminary step is required. *Gillette* v. *Bullard*, 20 Wall. 571, 575; *Tissot* v. *Darling*, 9 Cal. 278, 281; *Smith* v. *Ramsay*, 6 Serg. & R. (Pa.) 573; Brandt on Sureties, sect. 404.

It is not necessary in order to charge the sureties in an appeal bond that an execution on the judgment recovered in the Appellate Court should be issued against the principal. When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the Appellate Court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor. Unless the bond contains some special provisions to that effect, the sureties in such a bond given in a common-law action do not become liable for the costs incurred in consequence of a new appeal to a still higher court; or, in other words, the sureties in a bond given in the District Court to indemnify the opposite party on an appeal to the Circuit Court are not liable for the costs incurred by a subsequent removal of the cause from the Circuit Court to the Supreme Court, the rule being that in that court the plaintiff in error or appellant must give a new bond; but it is equally well settled that such new appeal will not diminish or discharge the liability of his sureties on the bond given in the District Court, unless the judgment rendered in the District Court is wholly reversed.

Apply these suggestions to the case before the court and it is clear that the Circuit Court gave judgment for the wrong party.

The judgment will be reversed and the cause remanded with directions to sustain the demurrer of the plaintiff to the affirmative defences set up in the answer, and to render judgment in favor of the plaintiff, in conformity with this opinion.

So ordered.

BOWDITCH v. BOSTON.

1. Under the statute of Massachusetts and the ordinance of Boston adopted pursuant thereto, that city is not responsible to the owner of buildings there situate which are destroyed in order to prevent the spreading of a fire, unless a joint order for their destruction be given by three or more engineers of the fire department, who are present, of whom the chief engineer, if present, must be one.
2. As it is only by force of the statute and ordinance that the city incurs a liability to such owner, he is not entitled to recover unless his case be within their terms, and the joint order be shown.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. George W. Morse for the plaintiff in error.
Mr. J. P. Healy, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The plaintiff in error, who is the assignee of the estate of Charles H. Hall, a bankrupt, alleges and relies upon the following case: —

A great fire occurred in the city of Boston on the night of the 9th and 10th of November, 1872. Hall was then the lessee and occupant of the premises described in the declaration. The fixtures, merchandise, and tools belonging to him in the part of the building covered by the lease were of the value of $60,000, and his leasehold estate was of the value of $10,000. The fire did not first break out in his premises, but that part of the building and the contents were in danger from its progress. Three fire-engineers, then at a place of danger in the immediate vicinity, directed the building including his premises to be demolished, to arrest the spreading of the fire. The building was blown up and destroyed accordingly. This measure stopped the progress of the fire. The premises were left unfit for occupation, and his personal effects, before mentioned, were destroyed by the catastrophe. This action is brought by his assignee to recover what was thus lost to the bankrupt.

The claim is founded upon certain statutes of the State of Massachusetts, and an ordinance of the city of Boston. A brief reference to their provisions, material to be considered in this case, will be sufficient.

In cases of fire, any three of certain designated officers "may direct any house or building to be pulled down or demolished when they may judge the same to be necessary in order to prevent the spreading of the fire." Mass. Gen. Stat., c. 24, sect. 4.

"If such pulling down or demolishing of a house or building is the means of stopping the fire, or if the fire stops before it comes to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building is that in which the fire first broke out, the owner shall receive no compensation." Id., sect. 5.

The city of Boston was authorized to establish a fire department, to consist of so many engineers, &c., "as the city council, by ordinance, shall from time to time prescribe." Mass. Special Stats., 1850, c. 22.

Pursuant to the authority thus conferred, the city council, in the manner prescribed, created such a department, and declared that it should "consist of a chief engineer and thirteen assistant engineers," &c. Ordinances of Boston, ed. 1869, sect. 1.

It was provided that "the chief engineer shall have the sole command at fires over all other engineers and officers and members of the fire department, and other persons who may be present at such fires," &c. Id., sect. 6.

"Whenever it is adjudged at any fire, by any three or more of the engineers present, of whom the chief engineer, if present, shall be one, to be necessary, in order to prevent the spreading of the fire, to pull down or otherwise demolish any building, the same may be done by their joint order." Id., sect. 11.

It appears that at the fire here in question the chief engineer and a number of the assistant engineers were present. Upon that subject there is no controversy.

The case was first tried in the District Court of the United States for that district.

The learned judge who presided at the trial directed the jury

to render a verdict for the defendant, which was accordingly done.

The plaintiff in error excepted, and having embodied in the record all the evidence given on the trial, sued out a writ of error and removed the case to the Circuit Court.

There the judgment of the District Court was affirmed. A further writ of error has brought the case here for review.

It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice. *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 637; *Improvement Company* v. *Munson*, 14 id. 442; *Pleasants* v. *Fant*, 22 id. 116.

The rule in the English courts is substantially the same. *Ryder* v. *Wombwell*, Law Rep. 4 Ex. 32; *Giblin* v. *McMullin*, Law Rep. 2 P. C. 335. In the latter case it was said: "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the *onus* of proof is imposed.

At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: "For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire, — some of them involving the destruction of life itself, — where the same rule is applied. "The rights of necessity are a part of the law." *Respublica* v. *Sparhawk*, 1 Dall.

357, 362. See also *Mouse's Case*, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4 T. R. 794; 1 Zab. (N. J.) 248; 3 id. 591; 25 Wend. (N. Y.) 173; 2 Den. (N. Y.) 461.

In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. Burlem. 145, sect. 6; id. 159, c. 5, sects. 24–29; Puffendorf, B. 2, c. 6.

The statute of Massachusetts, as far as it goes, gives as a bounty that which could not have been claimed before. How far the statute trenches upon the legal and natural right which every one possessed prior to its enactment, is a subject we need not consider.

All the questions arising in this case are questions of local law. It is our duty to consider the controversy as if we were a court of the State, and sitting there to apply her jurisprudence.

The subject was within her police power, and it was competent for her to legislate upon it as she might deem proper. It is wholly beyond the sphere of Federal authority.

Whether the statute is to be construed strictly, as being in derogation of the common law, or liberally, as being remedial in its character, are points within the exclusive cognizance of her tribunals. The jurisdiction of the District Court arose from the incidental fact that a claim in behalf of a bankrupt's estate was involved, and that his assignee was the plaintiff.

In order to charge the city, "the remedy being given by statute only, the case must be clearly within the statute." . . . "The city is responsible by force of the statute only, and such responsibility is limited to the cases specially contemplated." *Taylor* v. *Plymouth*, 8 Metc. (Mass.) 465.

The law of the case has been clearly laid down by the highest judicial court of the State, and we cannot do better than quote it at length.

"The plain intent of the statute is that no house or building shall be demolished unless it shall be judged necessary by three fire-wards, or by the other officers authorized to act in their absence, or where no fire-wards have been appointed. It is the united judgment of the officers to whom the power is given,

acting upon the immediate exigency, and determining the necessity, which is contemplated by the statute. Its language is capable of no other reasonable interpretation. It is a joint authority expressly given to the officers designated, acting together, and cannot be exercised by a minority or by any one of them.

"It is not sufficient, therefore, that a general conclusion or judgment was arrived at by the three fire-wards or the other officers mentioned, that it was necessary to destroy some buildings in order to put a stop to the further extension of a fire. They must go further. They must determine upon the particular house or building which they shall adjudge necessary to be destroyed for the purpose. This cannot be left to the individual judgment of any one of the fire-wards." *Ruggles* v. *Inhabitants of Nantucket*, 11 Cush. (Mass.) 433.

The validity of the ordinance creating the fire department was not questioned in the argument here, and we see no reason for doubt upon the subject. The statute which authorized the ordinance declared that "the engineers or other officers," appointed pursuant to the provisions of the latter, should be clothed with all the powers and duties "conferred upon firewards by the Revised Statutes or special acts relating to the city of Boston now in force," and that the city council might "make such regulations in regard to their conduct and government" as it might see fit to ordain. For all the purposes of this case the engineers were fire-wards at and during the fire here in question. Several things were necessary to the validity of an order for the destruction of the tenement of the bankrupt: —

At least three engineers of the fire department — the chief engineer, if present, being one — must have consulted together touching the blowing up of that particular building.

They must all have arrived at the conclusion that it was necessary to destroy it in order to arrest the progress of the flames.

They must all jointly and specifically have ordered that building to be destroyed.

Upon looking carefully through the record, we have failed to find the slightest proof that any three of the fire engineers

ever consulted in relation to destroying the building to which this controversy relates; that any three, jointly or severally, expressly or by implication, gave an order that it should be destroyed; or that this particular building was ever present to the minds of any three of the engineers in that connection.

The mayor was on the ground early after the commencement of the fire, and was there, actively engaged, until the next morning. He heard consultations as to the use of gunpowder, but his testimony is an entire blank as to the points here under consideration.

The chief engineer was called by the plaintiff and was fully examined.

He gave authority to numerous persons according to this formula: —

"Colonel Shepard will blow up buildings or remove goods as his judgment directs.

"J. S. DAMRELL, *Chief Engineer*."

The utter nullity of such an instrument is too plain to require remark.

In the course of the chief engineer's testimony these questions and answers occur: —

"*Q.* You and the engineers did not direct the blowing up of any buildings in Boston by gunpowder?

"*A.* No, sir. Not when I was present. If any three engineers did so, when I was not present, I have yet to learn the fact.

"*Q.* Did you know that any three engineers directed the demolishing of any building by gunpowder?

"*A.* I do not know the fact."

The building was blown up by General Burt, the postmaster of Boston. He had a written paper from the chief engineer, and it was in his possession when he testified. The document is not in the record, and its contents are not shown. Upon the points here in question his testimony was as follows: —

"*Q.* Did you at any time consult with three of the engineers of the city, after you started the scheme of blowing up?

"*A.* I don't think we did. I had in my mind distinctly what to do, and we stuck to it until we got it done.

"*Q.* You used your own discretion entirely?

"*A.* I intended to. I intended to keep that line plumb up, if I could, and not to let it get into the new post-office building, and not get over into this part of the city."

These witnesses are unimpeached and uncontradicted, and what they say is conclusive. It is unnecessary to refer particularly to the rest of the testimony. Nothing is to be found in it in conflict with the parts we have quoted. It affords no ground for a plausible conjecture that the facts were otherwise. The plaintiff not only failed to prove what he claimed, but his own testimony counter-proved it and established the negative. The proposition was vital to his case.

Judgment affirmed.

MISSOURI v. LEWIS.

1. The provision in the first section of the Fourteenth Amendment to the Constitution of the United States, which prohibits a State from denying to any person the equal protection of the laws, contemplates the protection of persons, and classes of persons, against unjust discriminations by a State; it does not relate to territorial or municipal arrangements made for different portions of a State.
2. A State is not thereby prohibited from prescribing the jurisdiction of its several courts, either as to their territorial limits, or the subject-matter, amount, or finality of their respective judgments or decrees.
3. Each State has full power to make for municipal purposes political subdivisions of its territory, and regulate their local government, including the constitution of courts, and the extent of their jurisdiction.
4. A State may establish one system of law in one portion of its territory, and another system in another, provided always that it neither encroaches upon the proper jurisdiction of the United States, nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district.
5. By the Constitution and laws of Missouri, the Saint Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in Saint Louis and some adjoining counties; the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State. *Held*, that this adjustment of appellate jurisdiction is not forbidden by any thing contained in the said amendment.

ERROR to the Supreme Court of the State of Missouri.

This writ of error was brought by the State of Missouri, on the relation of Frank J. Bowman, to reverse the judgment of the Supreme Court of Missouri refusing to issue a *mandamus* to Edward A. Lewis, Charles S. Hayden, and Robert A. Bakewell, judges of the Saint Louis Court of Appeals. The object of the *mandamus* was to compel the latter court to grant his application for an appeal to the said Supreme Court from a judgment of said Court of Appeals, affirming a judgment of the Circuit Court of Saint Louis County, removing Bowman, a resident of that county, from the practice of law in the State, he having by the verdict of a jury been found guilty upon charges preferred against him by the committee of prosecution of the Bar Association.

Wagner's Missouri Statutes, c. 12, p. 198, title "Attorneys-at-Law," contain the following provisions: —

"SECT. 6. Any attorney or counsellor at law who shall be guilty of any felony or infamous crime, or improperly retaining his client's money, or of any malpractice, deceit, or misdemeanor in his professional capacity, may be removed or suspended from practice, upon charges exhibited and proceedings thereon had, as hereinafter provided.

"SECT. 7. Such charges may be exhibited, and proceedings thereon had in the Supreme Court, or in the Circuit Court of the county in which the offence shall have been committed or the accused resides.

"SECT. 8. The court in which such charges shall be exhibited shall fix a day for the hearing, allowing a reasonable time, and the clerk shall issue a citation accordingly, with a copy of the charges annexed, which may be served in any county in this State.

"SECT. 9. The copy of the charges and citation shall be served in the same manner as a declaration and summons in civil actions, a reasonable time before the return-day thereof.

"SECT. 10. If the party served with citation shall fail to appear, according to the command thereof, obedience may be enforced by attachment, or the court may proceed *ex parte*.

"SECT. 11. If the charges allege a conviction for an indictable offence, the court shall, on the production of the record of conviction, remove the person so convicted, or suspend him from practice for a limited time, according to the nature of the offence, without further trial.

"SECT. 12. Upon charges other than in the last section specified, the court shall have power only to suspend the accused from practice, until the facts shall be ascertained in the manner hereinafter prescribed.

"SECT. 13. If the charge be for an indictable offence, and no indictment be found, or being found, shall not be prosecuted to trial within six months, the suspension shall be discontinued, unless the delay be produced by the absence or procurement of the accused, in which case the suspension may be continued until a final decision.

"SECT. 14. The record of conviction or acquittal of any indictable offence shall, in all cases, be conclusive of the facts, and the court shall proceed thereon accordingly.

"SECT. 15. When the matter charged is not indictable, a trial of the facts alleged shall be had in the court in which the charges are pending, which trial shall be by a jury; or if the accused, being served with process, fail to appear, or appearing, does not require a jury, by the court.

"SECT. 16. In all cases of conviction, the court shall pronounce judgment of removal or suspension according to the nature of the facts found.

"SECT. 17. In all cases of a trial of charges in the Circuit Court the defendant may except to any decision of the court, and may prosecute an appeal or writ of error in all respects as in actions at law.

"SECT. 18. Every judgment or order of removal or suspension, made in pursuance of this chapter by the Supreme Court, or by any circuit court, shall operate, while it continues in force, as a removal or suspension from practice in all the courts of this State."

The Constitution of Missouri adopted Oct. 30, 1875, contains the following provisions, art. 6, title "Judicial Department:"—

"SECT. 1. The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a supreme court, the Saint Louis court of appeals, circuit courts, criminal courts, probate courts, county courts, and municipal corporation courts.

"SECT. 2. The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under the restrictions and limitations in this Constitution provided.

"SECT. 3. The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue

writs of *habeas corpus, mandamus, quo warranto, certiorari*, and other remedial writs, and to hear and determine the same."

"SECT. 12. There is hereby established in the city of Saint Louis an appellate court, to be known as the Saint Louis Court of Appeals, the jurisdiction of which shall be coextensive with the city of Saint Louis, and the counties of Saint Louis, Saint Charles, Lincoln, and Warren. Said court shall have power to issue writs of *habeas corpus, quo warranto, mandamus, certiorari*, and other original remedial writs, and to hear and determine the same, and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the Saint Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court, in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of $2,500; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title of any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of this State or any State officer is a party, and in all cases of felony."

"SECT. 19. All cases which may be pending in the Supreme Court at Saint Louis at the time of the adoption of this Constitution, which, by its terms, would come within the final appellate jurisdiction of the Saint Louis Court of Appeals, shall be certified and transferred to the Saint Louis Court of Appeals, to be heard and determined by said court."

"SECT. 21. Upon the adoption of this Constitution, and after the close of the next regular terms of the Supreme Court at Saint Louis, and Saint Joseph, as now established by law, the office of the clerk of the Supreme Court at Saint Louis and Saint Joseph shall be vacated, and said clerks shall transmit to the clerk of the Supreme Court at Jefferson City all the books, records, documents, transcripts, and papers belonging to their respective offices, except those required by sect. 19 of this article to be turned over to the Saint Louis Court of Appeals; and said records, documents, transcripts, and papers shall become part of the records, documents, transcripts, and papers of said Supreme Court at Jefferson City, and said court shall hear and determine all the cases thus transferred, as other cases."

"SECT. 27. . . . The Saint Louis Court of Appeals shall have

exclusive jurisdiction of all appeals from, and writs of error to, the Circuit Courts of Saint Charles, Lincoln, and Warren Counties, and the Circuit Court of Saint Louis County in special term, and all courts of record having criminal jurisdiction in said counties."

The statutes of Missouri provide that "every person aggrieved by any final judgment or decision of any circuit court, in any civil case, including cases of contested elections, may make his appeal to the Supreme Court." Act of Feb. 28, 1871; Wagn. Mo. Stat., sect. 9, p. 159.

"In all cases of final judgment, rendered upon any indictment, an appeal to the Supreme Court [District Court] shall be allowed the defendant, if applied for during the term at which such judgment is rendered." Gen. Stat. Mo., c. 215, sect. 1.

The act of Feb. 16, 1877, provides that, —

"SECT. 1. Every person aggrieved by any final judgment or decision of any circuit court, or the Saint Louis Court of Appeals, may make his appeal to the Supreme Court in any civil case." Acts of Legislature of Missouri, session 1877.

Mr. Jeremiah S. Black, *Mr. George F. Edmunds*, and *Mr. David Wagner* for the plaintiff in error.

1. Bowman, the relator, having asserted his right to appeal from the Saint Louis Court of Appeals, on the ground that the provisions limiting appeals from that court were in violation of the Fourteenth Amendment, and other articles of the Constitution of the United States, the jurisdiction of this court to review the judgment is clear (*Slaughter-House Cases*, 16 Wall. 36), and the case is properly here on a writ of error. *Memphis* v. *Brown*, 94 U. S. 715; *Ward* v. *Gregory*, 7 Pet. 633; *Columbian Insurance Co.* v. *Wheelright*, 7 Wheat. 534; *Dove* v. *Ind. School Dist.*, 41 Iowa, 689.

2. Missouri denies to some of its citizens the equal protection of the laws, by forbidding that access to the department administering them, which other citizens enjoy.

The right of an unrestricted appeal to the Supreme Court, granted to those residing in one hundred and nine counties of the State, is, in like cases, withheld from those residing in either of four other counties, or in the city of Saint Louis.

It cannot be answered that a hearing before the Saint Louis Court of Appeals is equivalent to that before the Supreme Court; for the State Constitution recognizes the superiority of the wisdom and power of the latter tribunal, by investing it with superintending control over all subordinate courts, and in some instances by giving to parties the right of appeal from the Saint Louis Court of Appeals.

A State, under a republican form of government, is as imperatively bound to give equal remedial rights as it is to impose equal burdens and obligations. *Vanzant* v. *Waddell*, 2 Yerg. (Tenn.) 270; *Walley's Heirs* v. *Kennedy*, id. 552; *State Bank* v. *Cooper et al.*, id. 621; *Reynolds* v. *Baker*, 6 Cold. (Tenn.) 221, 228.

An attorney residing in one of the privileged counties of the State could have appealed a similar cause to the Supreme Court, while Bowman, although forced, as a resident of Saint Louis, to contribute by payment of taxes to the expenses of that court, finds its doors barred against him.

A State, if she precluded a citizen by name from seeking redress before the same tribunals provided for the administration of justice to her other citizens, would violate the Federal Constitution; and a provision by which a resort to her Supreme Court is denied to those only who live in a particular district within her limits is equally objectionable and void.

We do not question the right of the State to establish, by constitutional provisions, intermediate appellate courts; but we submit that to allow to a large portion of her citizens the right of appeal to her Supreme Court, and deny, under the same circumstances and conditions, that right to other citizens is in plain violation of the fundamental principle of equality, recognized and guaranteed by the Constitution of the United States. Art. 4, sect. 4, Const. U. S.; *Budd* v. *State*, 3 Humph. (Tenn.) 490; 2 Yerg. (Tenn.) 270; *State Bank* v. *Cooper*, id. 599; *Jones* v. *Perry*, 10 id. 59.

3. If Bowman was of African descent, and the Constitution of Missouri prohibited a negro from appealing to the Supreme Court of the State for redress of his injuries, such a provision would be construed to be a denial of the "equal protection

of the laws," and in violation of the Fourteenth Amendment. *Slaughter-House Cases*, *supra*.

In this case, the discrimination complained of is exercised against him and other citizens, who are as justly entitled to protection from wrongful discrimination, and to the full protection of their constitutional right of equality before all the courts of the State as if they were of African descent. If not, that amendment which sought to establish equality before the law establishes inequality, by giving preference to the rights of the colored race, and affording them superior protection.

The weight of authority and sound reason seem to establish, that while the immediate object sought by the adoption of the amendment was the protection of the negro, its provisions extend and inure to the common benefit of all.

4. By the fourth section of the fourth article of the Constitution of the United States a republican form of government is guaranteed to every State in this union.

"The equality of the rights of citizens," says Mr. Chief Justice Waite, "is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. The duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny that right." *United States* v. *Cruikshank et al.*, 92 U. S. 542, 555; *Munn* v. *Illinois*, 94 id. 125; *Bank of Columbia* v. *Okeley*, 4 Wheat. 244.

It is submitted that the provisions touching the organization of the Saint Louis Court of Appeals, which limit the right of appeal therefrom, are in violation of the Constitution of the United States, because, —

First, They violate a fundamental principle of a republican form of government, — equality before the law, and impartial administration of the law.

Second, They deny the "equal protection of the laws" to citizens of the State and United States, and are therefore repugnant to, and inconsistent with, the provisions of the Federal Constitution.

Mr. Henry Hitchcock and *Mr. Chester H. Krum*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

By the Constitution and laws of Missouri an appeal lies to the Supreme Court of that State from any final judgment or decree of any circuit court, except those in the counties of Saint Charles, Lincoln, Warren, and Saint Louis, and the city of Saint Louis; for which counties and city the Constitution of 1875 establishes a separate court of appeal, called the Saint Louis Court of Appeals, and gives to said court exclusive jurisdiction of all appeals from, and writs of error to, the circuit courts of those counties and of said city; and from this court (the Saint Louis Court of Appeals) an appeal lies to the Supreme Court only in cases where the amount in dispute, exclusive of costs, exceeds the sum of $2,500, and in cases involving the construction of the Constitution of the United States or of Missouri, and in some other cases of special character which are enumerated. No appeal is given to the Supreme Court in a case like the present arising in the counties referred to, or in the city of Saint Louis; but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court.

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of Saint Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions

of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the probibition that "no State shall deny to any person within its jurisdiction the equal protection of the laws." It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one

system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diver-

sities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies.

If a Mexican State should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance.

It is apparent from the view we have taken of the import and effect of the equality clause of the Fourteenth Amendment, which has been relied upon by the plaintiff in error in this case, that it cannot be invoked to invalidate that portion of the judicial system established by the Constitution and laws of Missouri, which is the subject of complaint. This follows without any special examination of the particular adjustment of jurisdictions between the courts of Missouri as affected by its Constitution and laws. Such a special examination, however, if it were our province to make it, would readily show that there is no foundation for the complaint which has been

made. Bowman has had the benefit of the right of appeal to the full extent enjoyed by any member of the profession in other parts of the State. In the outside counties they have but one appeal, — from the Circuit Court to the Supreme Court. In Saint Louis, he had the benefit of an appeal from the Circuit Court of Saint Louis County to the Saint Louis Court of Appeals. This is as much as he could ask, even if his rights of appeal were to be nicely measured by the right enjoyed in the outside counties. The Constitution of the State has provided two courts of appeal for different portions of its territory, — the Saint Louis Court of Appeals for one portion, and the Supreme Court for another portion. It is not for us, nor for any other tribunal, to say that these courts do not afford equal security for the due administration of the laws of Missouri within their respective jurisdictions. Where the decisions of the Saint Louis Court of Appeals are final, they are clothed with all the majesty of the law which surrounds those of the Supreme Court. If in certain cases a still further appeal is allowed from the one court to the other, this fact does not derogate in the least from the credit and authority of those decisions of the former which by the Constitution and laws of the State are final and conclusive.

But this special consideration is an accidental phase of the particular case. The true ground on which the case rests is the undoubted power of the State to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it sees fit, subject only to the limitations before referred to; and our conclusion is that this power is unaffected by the constitutional provision which has been relied on to invalidate its exercise in this case.

Judgment affirmed.

ARTHUR v. DODGE.

1. Between Aug. 28 and Oct. 18, 1874, A. imported into the port of New York certain articles known as "tin in plates," "terne plates," and "tagger's tin," upon which the collector imposed a duty of fifteen per cent *ad valorem*. *Held*, that, under sects. 2503 and 2504 of the Revised Statutes, said articles were dutiable at only ninety per cent of that rate.
2. *Davies* v. *Arthur* (96 U. S. 148) and *United States* v. *Bowen* (100 id. 508) cited and approved.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Between Aug. 28 and Oct. 18, 1874, Dodge and his partners, constituting the firm of Phelps, Dodge, & Co., imported into the port of New York sundry invoices of "tin in plates," "terne plates," and "tagger's tin," whereon Arthur, the then collector, imposed a duty of fifteen per cent *ad valorem*, which the firm paid under protest. The following is a copy of one of their protests, the others being substantially like it: —

"SIR, —We do hereby protest against the payment of fifteen per cent charged on sixteen hundred and fifty (1650) boxes tin plates of the dutiable value of $14,422, gold, contained in our entry made on the twenty-third day of September, 1874, per S. S. 'Algeria,' from Liverpool, England, in cases marked P. D. & Co., and various other marks, claiming that under existing laws said goods are only liable to a duty of ninety per cent of fifteen per cent or thirteen and one-half per cent, because title 33, sect. 2503, of the codification of the revenue laws provides certain rates of duty on articles which are mentioned in Schedule E of sect. 2504, with the provisions that all articles mentioned in 2503 shall have the benefit of ten per cent reduction — one of the provisions — on all metals not herein otherwise provided for, and on all manufactures of, &c., &c., includes tin plate, and pay the amount exacted in order to get possession of the goods, and look to you for refund of the same."

The Secretary of the Treasury having, on appeal, affirmed the decision of the collector, the firm brought this suit to recover the difference between the amount paid and ninety per cent thereof.

There was a judgment for the plaintiffs. Arthur then sued out this writ of error.

The Solicitor-General for the plaintiffs in error.
Mr. John E. Parsons, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The principal question in this case is, whether, under sects. 2503 and 2504 of the Revised Statutes, "tin plate" and "terne tin" are dutiable at fifteen per cent *ad valorem*, or at ninety per cent of that rate. It is conceded that under the act of 1872 (17 Stat. 231, sects. 2, 4), which continued in force until the Revised Statutes went into effect, the duty was fifteen per cent *ad valorem*.

The sections of the Revised Statutes referred to, so far as they are material to the determination of the case, are as follows: —

"SECT. 2503. There shall be levied, collected, and paid upon all articles mentioned in the schedules contained in the next section, imported from foreign countries, the rates of duty which are by the schedules respectively prescribed: *Provided*, that on the goods, wares, and merchandise in this section enumerated and provided for, imported from foreign countries, there shall be levied, collected, and paid only ninety per centum of the several duties and rates of duty imposed by the said schedules upon said articles, severally, that is to say:

. . . . . .

"On all iron and steel, and on all manufactures of iron and steel, of which such metals, or either of them, shall be the component part of chief value, excepting cotton machinery.

"On all metals not herein otherwise provided for, and on all manufactures of metals of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry, and other articles of ornament: *Provided*, that all wire rope and wire strand, or chain made of iron wire, either bright, coppered, galvanized, or coated with other metals, shall pay the same rate of duty that is now levied on the iron wire of which said rope or strand or chain is made; and all wire rope and wire strand or chain made of steel wire, either bright, coppered, galvanized, or coated with other metals, shall pay the same rate of duty that is now

levied on the steel wire of which said rope or strand or chain is made."

"SECT. 2504. Schedule E. Metals.

. . . . . .

"Tin in plates or sheets, terne, and tagger's tin; fifteen per centum *ad valorem*. . . ."

In *United States* v. *Bowen* (100 U. S. 508), we held that the Revised Statutes must be treated as a legislative declaration by Congress of what the statute law of the United States was Dec. 1, 1873, on the subjects they embrace, and that when the meaning was plain, the courts could not look to the statutes which have been revised to see if Congress erred in that revision. Looking, then, to this case, we find that Congress has declared the law to be that only ninety per cent of the rates of duty imposed by the schedules in sect. 2504 shall be collected on all metals not otherwise provided for in sect. 2503, and on all manufactures of metals of which either of them is the component part of chief value, and on iron and all manufactures of iron of which that metal shall be a component part of chief value. In this there seems no ambiguity, and if "tin plates" and "terne tin" are metal or manufactures of metal, or if they can be classed as iron or manufactures of iron in which iron is the component part of chief value, there cannot be a doubt that they come within the ninety per cent clause. They are classified in the schedules as metals. All the elements of which they are composed are metals. Their manufacture consists in the combination of the several component parts. The tin is still tin, and the iron still iron. There has been no substantial chemical change. All their metallic qualities still remain. They are what they purport to be, manufactures of iron, tin, and sometimes lead, and the result is a new article of commerce, of which metals, as metals, form the component parts. Although they have, when combined, a particular name, it is a name applicable to the element in the combination, whose use it was intended in this way to secure. Percussion-caps, watches and jewelry, and other articles of ornament, made of metal, must have been considered as manufactures of metal, or it would not have been necessary to except them by name from the operation of the reduction clause.

Without pursuing the subject further, it is sufficient to say that we are clearly of the opinion that the articles in question were dutiable only at ninety per cent of the rate of fifteen per cent *ad valorem*.

An objection is made to the sufficiency of the protest. The claim is that it was not so distinct and specific as to apprise the collector of the nature of the objection made to the duty imposed. "Technical precision," says Mr. Justice Clifford, for the court, in *Davies* v. *Arthur* (96 U. S. 148, 151), "is not required; but the objection must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one that could be obviated." We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made.

Judgment affirmed.

THE "FLORIDA."

On the night of Oct. 7, 1864, the rebel steamer "Florida" was captured in the port of Bahia, Brazil, by the United States Steamer "Wachusett," and brought thence to Hampton Roads, where, by a collision, she was sunk. The United States disavowed the act of the captain of the "Wachusett" in making the capture. He libelled the "Florida" as a prize of war. *Held*, that the libel was properly dismissed.

APPEAL from the Supreme Court of the District of Columbia.

On the night of the 7th of October, 1864, the United States steamer "Wachusett," under the command of Commander Collins, captured the rebel steamer "Florida," in the port of Bahia, in the empire of Brazil. The "Florida" had gone there to supply herself with provisions and for the repair of her

engine. She was anchored under cover of a Brazilian vessel of war, on the side next to the shore, and Commander Collins was notified that if he attacked her he would be fired upon by a neighboring fort and by the war vessels of the empire then present. The commander, availing himself of the darkness of the night, approached and fired upon the "Florida," received her surrender, attached a hawser to her extending from his vessel and towed her out to sea. He was pursued by a Brazilian war vessel, but escaped with his prize by superior speed. The steamers reached the United States at Hampton Roads. There the "Florida" was sunk by a collision, and lies where she went down. The American consul at Bahia was on board of the "Wachusett" at the time of the attack and incited it, and participated in the seizure. He returned to the United States with Commander Collins.

The Brazilian government demanded the return of the vessel and other reparation by the United States. The latter disavowed the capture, and the matter was amicably adjusted.

The commander libelled the "Florida" as prize of war. The court below dismissed the case, and he appealed to this court.

The case was argued by *Mr. Benjamin F. Butler* and *Mr. Frank W. Hackett* for the appellant.

The following points are taken from Mr. Hackett's brief: —

The captors are entitled to have the question of prize or no prize judicially determined. Act June 30, 1864, 13 Stat. 306. The adjudication is essential to their protection against her former owner, and, if in their favor, gives them also the right to proceed against the colliding vessel, if through its negligence the prize was sunk. The "Florida's" hull, guns, &c., are of some determinable value, and the question of ownership therein must be decided.

There is a *res* in existence. The ship is sunk in a river. The court will not inquire whether it will pay to raise her.

The executive has no right to instruct the judicial branch of the government as to the disposition of this libel, nor should its wishes have any force whatever in a tribunal sitting as a high court of prize.

In *The Elsebe* (5 Rob. 173), where Sir William Scott de-

cided that the power of the crown to direct the release of property seized as prize, before adjudication and against the will of the captors, was not taken away by any grant of prize conferred in the Order of Council, the Proclamation, or the Prize Act, orders had been given by the Lords of Admiralty to release the ships before the question was raised in the prize court. In the case at bar, no such order was ever given or promised to Brazil.

For the views of Mr. Wheaton on the subserviency of Sir William Scott to the orders of the crown, see Lawrence's Wheaton, 973; Roberts, Adm. & Prize, 480, 519.

In Great Britain, the issue of peace or war is lodged in the crown. The *jus persequendi* in capture being conveyed only in the Orders in Council, and all claims of the captor subordinated to the right of the crown to make such disposition as it pleases of the captured property, the Queen may control the conduct of a prize suit from the beginning. She has supreme power, with the advice of her council, to relax her belligerent rights, and so far to make law for the prize court. *The Phenix*, 1 Spink, 306.

The right to capture in the name of the United States comes not from the Executive, but from Congress. Until condemnation, no property vests in the sovereign or the captor. 10 Op. Att.-Gen. 519. Should the government desire immediately to make use of the captured vessel, an appraisement is made, and her value, in case of a subsequent condemnation, represents the prize fund. Act March 3, 1863, sect. 2.

The act of June 30, 1864 (*supra*), although modelled upon the English prize acts, presents certain features essentially distinct from them. In England, the prize court exercises, in time of war only, a peculiar but extraordinary jurisdiction, specially conferred by Parliament. Roberts, Adm. & Prize, 444. In this country, the prize courts are ever open to prize causes. Their jurisdiction extends not only to cases specially provided for by Congress, but to limits recognized by international law. or the custom and usage of nations. Id. 445. The captors themselves are authorized, under certain circumstances, to commence proceedings, a right unknown to the English prize law.

The question here is not, as in the "Elsebe," whether in time of war the Executive can give up to a foreign nation a captured vessel without making reparation to the captors, but whether, after having gained jurisdiction, and the custody of the vessel, a prize court, sitting in the United States in time of peace, will be controlled by the wishes of the Executive in determining whether the vessel be or be not good prize. The act makes it the duty of the district attorney, upon report of the prize-master, to file a libel against the property, and to "proceed diligently to obtain a condemnation and distribution thereof." Rev. Stat., sect. 4618. The Attorney-General, by opposing this libel and asking its dismissal, is asserting a power not granted by the act.

The alleged violation of the neutrality of Brazil is no defence to this libel. This is an objection which the neutral nation alone can interpose. *The Lilla*, 2 Sprague, 177; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266.

A capture made within neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the neutral sovereign that its legal validity can be called in question, and as to him, and him only, is it to be considered void. *The Anne*, 3 Wheat. 435. It was there held that even a consul, unless specially authorized by his government, cannot interpose a claim of violated sovereignty. *The Sancta Trinita*, cited in a note to *The Anne*, shows that the French law is like the English and American in this respect. See 3 Phillimore, Int. Law, p. 453, where *The Anne* is approvingly cited. 1 Kent, Com. (12th ed.) 117, note 1; id. 121; *The Etrusco*, 3 C. Rob. 162, note.

It is objected that the capture of the "Florida" was in direct violation of the orders of the Secretary of the Navy, and therefore illegal and void; and that the distribution of the proceeds of her sale as prize would be a reward to officers for disobedience.

Those orders are nothing more than regulations for the discipline of the navy. Their violation subjects the offender to a court-martial. "If the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, it would afford a complete

justification of the captors in all tribunals of prize." *Maisonnaire* v. *Keating*, 2 Gall. 325. The orders of the Secretary can go no further than international law itself in stamping the capture with illegality. Commander Collins was, by a court-martial, found guilty of disobeying the orders of the Secretary, but the sentence of dismissal was not approved.

Nor can it be urged that the capture was not for the use and benefit of the United States. It is a matter of public record that this government lodged before the tribunal of arbitration at Geneva claims for direct losses to our merchant marine inflicted by the "Florida," amounting to over $4,000,000.

Suppose that immediately on the arrival of the "Florida" at Hampton Roads the Southern Confederacy had collapsed, Brazil would have demanded reparation, but not the return of the vessel. Would not she in that event have been decreed good prize? What difference between this supposed state of things, and that where, after the war was over and the honor of Brazil had been satisfied, the wrecking company had raised the "Florida," pumped her out, and she had been sold, and the proceeds held as a prize fund? In neither case could the United States set up the invasion of neutral rights as against the claim of the captors to have the ship declared good prize.

Besides, the objection that neutrality was violated is completely removed by the seventh section of the act of 28th July, 1866 (14 Stat. 322), which enacts "that the Secretary of the Navy be, and he is hereby, authorized to dispose of the property saved from the rebel steamer 'Florida,' and distribute the proceeds thereof as other prize money is required by law to be distributed." In accordance with this provision, the sum of $20,399.43 was distributed as prize-money to the captors, being, as between them and the United States, the value of certain property captured on board. Congress, therefore, sanctioned the capture as lawful.

The Solicitor-General, contra.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

The legal principles applicable to the facts disclosed in the

record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius, De Jure Belli, b. 3, c. 4, sect. 8; Bynkershoek, 61, c. 8; Burlamaqui, vol. ii. pt. 4, c. 5, sect. 19; Vattel, b. 3, c. 7, sect. 132; Dana's Wheaton, sect. 429 and note 208; 3 Rob. Ad. Rep. 373; 5 id. 21; *The Anne*, 3 Wheat. 435; *La Amistad de Rues*, 5 id. 385; *The Santissima Trinidad*, 7 id. 283, 496; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266; 1 Kent, Com. (last ed.), pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: "But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are."

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libellant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Phillips* v. *Payne*, 92 U. S. 130.

These things must necessarily be so, otherwise the anomaly would be possible, that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the offence out of which the controversy arose. When the capture was disavowed by our government, it became for all the purposes of this case as if it had not occurred.

Lastly, the maxim, "*ex turpi causa non oritur actio*," applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct.

Decree affirmed.

NATIONAL BANK v. HALL.

A., B., & Co., a firm engaged in selling live-stock on commission, authorized a bank to cash drafts drawn on the firm by C., their agent, who forwarded live-stock to them. Some controversy arising, A., B., & Co. wrote to the bank as follows: —

"JAN. 15, 1876.

"Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to C."

The cashier of the bank replied as follows: —

"JAN. 17, 1876.

"Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to C. on stock to come in. Have always supposed it was in transit. After this we shall require ship'g bill."

There was no further communication on this subject between the parties. Two clerks of A., B., & Co. who were aware of this correspondence became partners without the knowledge of the bank, and the business was thereafter carried on in the same name. C. continued to draw on the firm as before, and the bank, without requiring bills of lading, to cash the drafts, all of which were accepted and paid by the firm. The bank acted in good faith. C. absconded with the proceeds of two drafts, and the firm brought this action against the bank to recover the amount. *Held*, 1. That the letters constitute no contract, and the bank is not responsible to the firm for cashing the drafts without bills of lading attached. 2. That if, however, a contract did arise from the cashier's unanswered letter of Jan. 17, 1876, it was with the then existing firm, and ceased on the subsequent change thereof by the admission of new members, without the knowledge or the consent of the bank.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Submitted by *Mr. William McFadon* for the plaintiff in error, and by *Mr. J. A. Sleeper* and *Mr. J. K. Whiton* for the defendants in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action of tort growing out of a contract. The bill of exceptions is well drawn, and reflects clearly the points in issue between the parties. A brief statement of the case, as it appears in the record, will be sufficient for the purposes of this opinion.

During the years 1874, 1875, and up to April 1, 1876, a firm under the name of Hall, Patterson, & Co. had existed at Chicago. It consisted of S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson, three of the five defendants in error. Their business was selling live-stock on commission at the Chicago stock-yards. William G. Melson was their agent at Quincy. To secure consignments at that point to his principals it was frequently necessary to make advances there. Hall, Patterson, & Co. arranged with The First National Bank of Quincy to cash Melson's drafts on them for this purpose. The drafts were numerous, and were all payable at sight. Penfield was the cashier of the bank. A draft for $125 was returned to the bank unpaid. This gave rise to some controversy between the bank and the drawees, but the matter was satisfactorily adjusted. Thereafter Hall, Patterson, & Co. addressed a letter to the cashier, which was as follows: —

"CHICAGO, Jan. 15, 1876.

"U. S. PENFIELD, *Cashier*, Quincy, Ill.:

"DEAR SIR, — Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to G. W. Melson. Please acknowledge receipt of this, and oblige,

"Yours respectfully,

"HALL, PATTERSON, & Co."

Penfield replied as follows: —

"QUINCY, ILL., Jan. 17, 1876.

"MESSRS. HALL, PATTERSON, & Co., Chicago:

"DEAR SIR,— Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to Melson on stock to come in. Have always supposed it was in transit. Have always taken his word. After this we shall require ship'g bill. Very truly yours,

"U. S. PENFIELD, *Cashr.*"

This letter closed the correspondence.

On the 1st of April, 1876, two of the defendants in error, Frazee and Greer, were added as partners to the firm of Hall, Patterson, & Co., as it had before existed. They had previously been employed as clerks, and knew of the writing of the letter to Penfield of the 17th of January, 1876. The new firm continued to do business under the name of Hall, Patterson, & Co., until after this suit was commenced. Melson acted as the agent of the new firm as he had acted for the old one. Between the 1st of April, 1876, and the happening of the loss out of which this controversy has arisen, he, as such agent, drew thirty-one drafts on his principals, amounting in the aggregate to $50,000. They were all at sight, were cashed by the bank, and were duly accepted and paid by Hall, Patterson & Co. There was no communication personally or by letter between any officer of the bank and any member of the firm, from the date of the cashier's letter of the 17th of January, 1876, until after the loss before mentioned. In the mean time, the bank was wholly ignorant of the change which had been made in the firm, and the drafts were cashed without such knowledge.

On the 7th of December, 1876, Melson drew drafts as follows: —

"$2,505. QUINCY, ILL., Dec. 7, 1876.

"Pay to the order of U. S. Penfield, Cas., twenty-five hundred and five dollars on account Jos. Hunnele 5 l'ds stock.

"W. G. MELSON.

"To HALL, PATTERSON, & Co., Stock-yards, Chicago, Ills."

"$2,004.00. QUINCY, ILLS., Dec. 7, 1876.

"Pay to the order of U. S. Penfield, Cas., two thousand and four dollars on account S. C. Fooley 4 l'ds hogs and cattle.

"W. G. MELSON.

"To HALL, PATTERSON, & Co., Stock-yards, Chicago, Ills."

Both these drafts were cashed by the bank on the day of their date, and the proceeds were paid to Melson. They were taken in the usual course of business and in entire good faith. The cashier testified that by "ship'g bill," in his letter of the 17th of January, 1876, he meant bill of lading, but that no bill of landing was taken by the bank after the date of that letter, and that all Melson's drafts — being thirty-one after the 1st of April, and ten or twelve between January 17 and April 1 of that year — were paid by Hall, Patterson, & Co. without bills of lading being attached, and without inquiry by the bank or its cashier concerning such securities. When the two drafts last mentioned were cashed the cashier had no knowledge whether they were drawn against stock or not. It was a rule of the bank, understood by all the stock agents doing business there, that no draft should be drawn unless the stock was in transit. Agents, when drawing, were, therefore, not usually questioned upon the subject. Their compliance with the rule was assumed by the bank. The two drafts last mentioned were indorsed and transmitted by the cashier to his correspondent in Chicago for collection. They were accepted and paid by Hall, Patterson, & Co., and the plaintiff in error received the money. No stock was forwarded by Melson. The transaction was a fraud on his part. Upon receiving the proceeds of the drafts he fled the country. He was diligently sought for, but could not be found. Hall, Patterson, & Co. brought this suit against the bank to recover the amount they had paid. A verdict and judgment were rendered in their favor in the court below, and the bank has brought the case here for review.

The bill of exceptions contains all the evidence given upon the trial. It discloses nothing which affords the slightest ground for any imputation against the bank or its officers with respect to their good faith and fair dealing in the transaction

out of which this controversy has arisen. The defendants in error claimed nothing in that respect in the court below, and they have made no such claim here.

The counsel for the bank has assigned twenty-seven errors. Some of them are repetitions of the same objections in different forms. None of them are frivolous, and many of them, if the exigencies of the case required it, would be entitled to grave consideration by this court.

The two letters between the parties, of the 15th and 17th of January, 1876, are the heart of the controversy. The stress of the case is upon their construction and effect. Passing by the other points raised in the record, we shall first give our attention to this subject, and our remarks will be confined to that and one other of the errors assigned.

By this letter Hall, Patterson, & Co. advised the bank: 1. That thereafter they would pay drafts only on actual consignments of stock; 2. That they would not pay money a week in advance of shipments; 3. That the stock must be in transit, so as to meet the draft the same day or the day after it was presented to them; 4. That this letter was to cancel all previous letters of credit as to W. G. Melson; 5. They asked an acknowledgment of the receipt of the letter.

These terms were clear and explicit. What was the reply of the bank?

The cashier answered: 1. That the letter of the other party was received; 2. That its contents were noted; 3. That the bank had never knowingly advanced money to Melson on stock to come in; 4. That the cashier had always taken Melson's word; 5. That thereafter the bank would require a "ship'g bill," meaning a bill of lading. This letter Hall, Patterson, & Co. never answered.

What was its effect as to them? It certainly did not accept their proposition, nor accede to their terms, that "the stock must be in transit to meet the draft on the same day or the day after presented." They made this expressly the condition of their accepting. The letter made no allusion to the requirement, and was wholly silent on the subject. Upon this point the parties were as wide asunder as if the letters had not been written.

For whose benefit was the shipping bill mentioned by the cashier to be taken? *Prima facie* the point is left in uncertainty. Here again the cashier is silent. But the interpretation is reasonable that Hall, Patterson, & Co., having in advance refused to accept, except upon the condition mentioned, the bank notified them in reply that it would thereafter take a bill of lading, not for their protection, but for its own. This view is strengthened by the conduct of the defendants in error, and the practical construction which they seem to have thus given to the clause. They did not say in reply that they understood the shipping bill was to be for their benefit, and that they should expect it to accompany the draft. No such bill was ever required by them or sent by the bank. They went on accepting and paying in silence exactly as before. The large number of drafts so accepted and paid by them has been already stated. If they relied on the shipping bills their conduct is inexplicable. If the understanding of the cashier had been different from what we have suggested, it is hardly to be supposed he would, from the date of his letter, have constantly disregarded his promise. Such conduct would have been worse than negligence. It would have been a gross breach of good faith to the other party. If, on the other hand, he meant by the clause that the bill of lading, if taken, was to be solely for the security of the bank, then it was for the bank to determine whether it should be required or not. If the cashier had confidence in Melson, and chose to exercise it, he exposed the bank to the hazard of the consequences; but there was certainly no responsibility to Hall, Patterson, & Co.

It is a remarkable feature of the case that, when the loss occurred, the defendants in error attached no importance to their own letter, but fell back upon the letter of the cashier which they had not answered, and which they had not before in any manner recognized as concerning them, much less as constituting a contract by the bank for their protection and benefit. To give it that effect, early and explicit notice to the bank was necessary. The afterthought of Hall, Patterson, & Co., when the loss occurred, came too late, and cannot avail them. *Adams* v. *Jones*, 12 Pet. 207; *McCollum* v. *Cushing*, 22 Ark. 540; *White* v. *Corlies*, 46 N. Y. 467; Story, Contr., sect. 1130.

The minds of the parties, as shown by these letters, moved on parallel, not on concentric lines. There was not the meeting of minds and the mutuality of assent to the same thing, which are necessary to create a contract. It is not pretended that the bank ever agreed to the proposition — if it may be considered such, and not the mere announcement of a purpose — contained in the letter of Hall, Patterson, & Co., and there is no evidence that the proposition of the bank — if the letter of the cashier can be regarded in that light — was ever accepted and acted upon by the parties to whom it was addressed. We are satisfied, however, that no proposition or promise was intended to be made by the bank, and that this was the understanding of the defendants in error. Their letter revoked the letter of credit they had before given to Melson. The bank announced, in reply, the manner in which it should thereafter do business with him. Thereafter, each occupied a position independent of the other. If the bank discounted drafts for Melson, the defendants in error, like any other drawees, had the option to accept or not, and in the latter event the bank could have had no redress against them, whether it had, or had not, taken a bill of lading. The destruction of the stock, after the bank took such a bill, would not have changed the relations of the parties. In our view, it was a thing with which the defendants in error had nothing to do.

If it be said they were obliged to accept if the bank took a shipping bill, it may be asked in reply, Where is the evidence of such an understanding on their part? There is nothing in the record that gives the slightest support to such an assumption. If they were not bound, where is the consideration for the alleged promise of the bank? The true view of the subject is that neither was in anywise bound or liable to the other.

The defendants in error notified the bank that thereafter they would accept only on the condition specified. The cashier answered, that the bank would protect itself. This is the sole effect of the letters. Thereupon the correspondence of the parties ceased, because there was nothing left for either to add.

Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. *Baldwin* v. *Milde-*

berger, 2 Hall (N. Y.), 176; *Coles* v. *Bowne*, 10 Paige (N. Y.), 526; *Utley* v. *Donaldson*, 94 U. S. 29.

Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and, therefore, neither is bound. *Appleby* v. *Johnson*, Law Rep. 9 C. P. 158.

A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer. *Baker* v. *Johnson County*, 37 Iowa, 186. See also *Jenness* v. *Mount Hope Iron Co.*, 53 Me. 20; *The Chicago & Great Eastern Railway Co.* v. *Dane*, 43 N. Y. 240; and *Suydam* v. *Clark*, 2 Sandf. (N. Y.) 133.

The learned judge who tried the case below instructed the jury that the letters constituted a binding contract, and that if the bank cashed any bills not based on actual consignments to the plaintiffs, and the plaintiffs sustained any injury by such failure, the bank is responsible.

This instruction was erroneous.

In making a contract, parties are as important an element as the terms with reference to the subject-matter. Mutual assent as to both is alike necessary. If, in fact, there were here, as claimed, a contract with reference to the latter, it was made on the 17th of January, 1876, with Hall and the two Pattersons, then constituting the firm known as Hall, Patterson, & Co. The change of the firm on the 1st of April following, by taking in Frazee and Greer as new members, without the knowledge or consent of the bank, put an end to the contract as to the latter. The proof is conclusive that the bank had no knowledge of the change until after commencement of this suit. The alleged cause of action arose more than eight months after the new partnership was formed, and nearly a year after the date of the letters by which the contract is claimed to have been made. There was no privity between the bank and the new firm. There was no binding acquiescence by the bank. There could be none without knowledge, and it is not claimed or pretended that such knowledge existed. A new party could no more be imported into the contract and imposed upon the bank without its consent, than a change could be made in like manner in the other pre-existing stipulations. The bank might

have been willing to contract with the firm as it was originally, but not as it was subsequently. At any rate, it had the right to know and to decide for itself. Without its assent a thing was wanting which was indispensable to the continuity of the contract. *Barns et al.* v. *Barrow*, 61 N. Y. 39; *Grant* v. *Naylor*, 4 Cranch, 224; *Bleeker* v. *Hyde*, 3 McLean, 279; *Taylor* v. *Wetmore*, 10 Ohio, 490; *Taylor* v. *McClung*, 2 Houst. (Del.) 24; *Hunt* v. *Smith*, 17 Wend. (N. Y.) 179; *Cremer* v. *Higginson*, 1 Mas. 323; *Russell* v. *Perkins*, id. 368.

The court refused an instruction asked for in accordance with this view of the subject. This, also, was an error.

The judgment will be reversed, and the cause remanded to the court below with directions to proceed in conformity to this opinion; and it is

So ordered.

MANUFACTURING COMPANY *v.* TRAINER.

1. Letters or figures affixed to merchandise by a manufacturer, for the purpose of denoting its quality only, cannot be appropriated by him to his exclusive use as a trade-mark.
2. An injunction will not be granted at his suit to restrain another manufacturer from using a label bearing no resemblance to the complainant's, except that certain letters, which alone convey no meaning, are inserted in the centre of each, the dissimilarity of the labels being such that no one will be misled as to the true origin or ownership of the merchandise.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. George M. Dallas and *Mr. James E. Gowen* for the appellant.

Mr. Samuel Dickson, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity to restrain the defendants, D. Trainer & Sons, from using on ticking manufactured and sold by them the letters "A. C. A." in the sequence here named, alleged by the complainant to be its trade-mark, by which it designates

ticking of a particular quality of its own manufacture; and to compel the defendants to account for the profits made by them on sales of ticking thus marked.

It appears that the complainant, the Amoskeag Manufacturing Company, a corporation created under the laws of New Hampshire, commenced the manufacture of ticking at Amoskeag Falls, in that State, some time prior to 1834, and marked its products with a label or ticket consisting of a certain device, within which were printed, in red colors, the name of the company, its place of manufacture, the words "Power Loom," and in the centre the single letter "A" or "B" or "C" or "D," according to the grade of excellence of the goods, the first quality being indicated by the first letter and the decreasing quality from that grade by subsequent letters in the alphabet. The device, apart from the words mentioned, was a fancy border in red colors, square outside and elliptical within, and the words in the upper and lower lines of the label were printed in a line corresponding with the inside curve of the border.

In the year 1834, or about that time, the company introduced an improvement in its manufacture, by which it produced a grade or quality of ticking superior to any which it had previously manufactured. For goods of this quality it used in its label or ticket, in place of the single letter "A," the three letters "A. C. A." The original device, with its colored border and printed words, indicating the company by which and the place where the goods were manufactured was retained; the only alteration consisting in the substitution of the three letters "A. C. A." in place of the single letter "A." Subsequently the company changed its place of manufacture from Amoskeag Falls to Manchester, in the same State, and a corresponding change was then made in the label. The three letters mentioned were placed in the label or ticket on all goods of the very highest quality manufactured by the complainant, the single letter being retained in the labels placed on other goods to indicate a lower grade or quality. The combination of the three letters was probably suggested, as is stated, by the initials of the words in the company's name, — Amoskeag Company, — with the letter "A" previously used, to denote the best quality

of goods it manufactured. It is contended by the complainant that the combination was adopted and used to indicate, not merely the quality of the goods, but also their origin as of the manufacture of the Amoskeag Company. It is upon the correctness of this position that it chiefly relies for a reversal of the decree dismissing the bill.

On the part of the defendants the contention is that the letters were designed and are used to indicate the quality of the goods manufactured and not their origin; that it was so adjudged many years ago in a case to which the company was a party in the Superior Court of the city of New York, which adjudication has been generally accepted as correct, and acted upon by manufacturers of similar goods throughout the country; and that the letters, as used by the defendants on a label or ticket having their own device, and in connection with words different from those used by the complainant, do not mislead or tend to mislead any one as to the origin of the goods upon which they are placed.

The general doctrines of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts will afford to those who originally appropriated them, are not controverted. Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation or by restraining others from applying it to their goods and compelling them to account for profits made on a sale of goods marked with it.

The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose either to the manufacturer or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article. This object of the trade-mark and the consequent limitations upon its use are stated with great clearness in the case of *Canal Company* v. *Clark*, reported in the 13th Wallace. There the court said, speaking through Mr. Justice Strong, that "no one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." And a citation is made from the opinion of the Superior Court of the city of New York in the case of the present complainant against Spear, reported in the 2d of Sandford, that "the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol, which from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

Many adjudications, both in England and in this country, might be cited in illustration of the doctrine here stated. For the purpose of this case, and in support of the position that a right to the exclusive use of words, letters, or symbols, to indicate merely the quality of the goods to which they are affixed cannot be acquired, it will be sufficient to refer, in addition to

the decisions mentioned in Wallace and Sandford, to the judgment of the Vice-Chancellor in *Raggett* v. *Findlater*, where an injunction to restrain the use by the defendants upon their trade label of the term "nourishing stout," which the plaintiff had previously used, was refused on the ground that "nourishing" was a mere English word denoting quality. Law Rep. 17 Eq. 29. Upon the same principle letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation; but are open to use by any one, like the adjectives of the language.

If, now, we apply the views thus expressed to the case at bar, we shall find the question involved to be of easy solution. It is clear from the history of the adoption of the letters "A. C. A." as narrated by the complainant, and the device within which they are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant, and not its origin. The device previously and subsequently used stated the name of the manufacturer, and no purpose could have been subserved by any further declaration of that fact. And besides, the letters themselves do not suggest any thing, and require explanation before any meaning can be attached to them. That explanation when made is that they are placed in the device of the company when it is affixed to the finest quality of its goods, while single letters are used in the same device when it is attached to goods of an inferior quality. They are never used by themselves, but merely as part of a device containing, in addition to the border in red, several printed terms. Alone the letters convey no meaning; they are only significant as part of the general device constituting the trade-mark. Used in that device to denote only quality, and so understood, they can be used by others for a similar purpose equally with the words "superior" or "superfine," or other words or letters or figures having a like signification.

We are aware that there is in the record the testimony of several witnesses to the effect that they understood that the letters were intended to indicate the origin as well as the qual-

ity of the goods to which they were attached, but it is entirely overborne by the patent fact that the label previously disclosed the name in full of the manufacturer and by the history of the adoption of the letters, as narrated by the complainant. As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And if they do not read the name as printed, the letters are unintelligible. If an explanation be asked of their purpose in the label, the only reasonable answer which can be given is the one which corresponds with the fact that they are designed merely to indicate the quality of the goods.

But there is another and equally conclusive answer to the suit. The label used by the defendants is not calculated to mislead purchasers as to the origin of the goods to which it is attached. It does not resemble the device of the complainant. Its border has a different figure; it is square outside and inside. It has within it the words "Omega" and "Ring Twist," as well as the letters "A. C. A." Neither the name of the complainant, nor of the place where its goods are manufactured, nor the words "Power Loom," are upon it. The two labels are so unlike in every particular, except in having the letters "A. C. A." in their centre, that it is impossible that any one can be misled in supposing the goods, to which the label of the defendants is attached, are those manufactured by the complainant. The whole structure of the case thus falls to the ground. There is no such imposition practised upon the public and no such fraud perpetrated upon the manufacturers, in attempting to dispose of the goods of one as those of another, as to call for the interposition of a court of equity.

Decree affirmed.

MR. JUSTICE CLIFFORD dissenting.

Symbols or devices used by a manufacturer or merchant to distinguish the products, manufactures, or merchandise which he produces, manufactures, or sells, from that of others, are called and known by the name of trade-marks. They are used in order that such products, manufactures, or merchandise may

be known as belonging to the owner of the symbol or device, and that he may secure the profits from its reputation or superiority. 15 Am. Cyclopedia, 832.

Equity courts in all civilized countries have for centuries afforded protection to trade-marks, the object of such protection being not only to secure to the individual the fruits of his skill, industry, and enterprise, but also to protect the public against fraud.

Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class.

Devices of the kind, in order that they may be entitled to protection in a court of equity, must have the essential qualities of a lawful trade-mark; but if they have, the owner becomes entitled to its exclusive use within the limits prescribed by law, the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents.

Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the device. Hence the use of it on one particular article of manufacture or merchandise will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner.

Sufficient appears to show that the plaintiffs, at an early period in the fourth decade of the present century, engaged in the manufacture of a fabric known as ticking of various grades and quality, and that subsequently they made a valuable improvement in the mode of manufacturing the fabric, which enabled them to produce a very superior articles. Before the introduction of the improvement they had been in the habit of marking their products in that species of manufacture with one of the first four letters of the alphabet, to designate the different grades of their manufacture when offered for sale in the market. Thirty-four years ago or more they introduced the new im-

provement in the manufacture of the fabric, and adopted the distinctive trade-mark, of which a fac-simile is exhibited in the transcript. When examined, it will be seen that it consists of the corporate name of the complainants, with a rough engraved surrounding, and the letters "A. C. A." plainly and conspicuously printed in the centre of the circular outside edge.

Conclusive proof is exhibited that the peculiar combination of letters adopted by the complainants as a symbol of trade originated with them, and that it suggested itself to them as comprising the initial letters of their familiar corporate name, with the addition of the letter "A" at the close, which had previously been used by them as indicating the best quality of the fabric manufactured by them before they made the alleged improvement.

Single letters of the kind are frequently used as a mark of quality; but the proofs in this case show to a demonstration that the peculiar combination of letters adopted by the complainants at the period mentioned were not adopted to denote quality merely, but as an appropriate and distinguishing trade-mark, symbol, or device, to indicate to the public and to purchasers that the fabric which bears the mark was of the manufacture of the manufacturing company of the complainants. Beyond all doubt, they adopted the symbol or device, and affixed it to the fabric of their trade to indicate the origin and ownership of the article.

Few manufactured products bear in their own external appearance sufficient evidence of their real character to protect the purchaser against fraudulent imitations. Integrity in manufacture and uniformity in quality are high recommendations to purchasers, and manufactured goods falling within that category are much preferred, both by the purchasers and consumers of the same; and when by long experience the public have learned to associate these elements of recommendation with a special symbol or brand, the wide and profitable sale of the articles bearing the same is assured, and the exclusive possession and use of the symbol or brand becomes of great value to the real owner. Purchasers are also interested that such a trade-mark should receive protection, as it is a guaranty of genuineness, and its value is proportioned to the business repu-

tation of the owners of the same and of the excellence of their manufactures. 4 Johns. Cyclopedia, part 2, p. 916.

Infringement by the respondents is charged, and the complainants pray for an injunction and for an account. Service was made, and the respondents appeared and set up various defences, as follows: 1. That the alleged trade-mark was never designed or used as such, but merely to designate one of the grades of the fabric which the complainants manufactured. 2. That the complainants are estopped by a prior decision of a court of competent jurisdiction to set up that the alleged symbol is a trade-mark. 3. They admit that they mark their goods with the letters "A. C. A.," but they deny that the mark is fraudulent or that it is calculated to deceive the public. 4. They deny that their conduct is in the slightest degree fraudulent or inequitable, or that the sale of their goods injures the complainants.

Proofs were taken, hearing had, and the Circuit Court entered a decree dismissing the bill of complaint. Prompt appeal was taken by the complainants to this court, and they assign the following causes of error: 1. That the Circuit Court erred in entering a decree dismissing the bill of complaint. 2. That the court erred in not granting the injunction as prayed. 3. That the court erred in not decreeing that the complainants are entitled to an account. 4. That the court erred in not sustaining the bill of complaint.

Attempt is made in argument to show that the symbol of the complainants was not adopted by them for any other purpose than to designate the grade or quality of the fabric which they manufacture and sell in the market; but it is a sufficient answer to that proposition to say that it is wholly unsupported by evidence, and is decisively overthrown by the proof introduced by the complainants.

Words or devices, or even a name in certain cases, may be adopted as a trade-mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are

employed to point to the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased. *Canal Company* v. *Clark*, 13 Wall. 311, 322.

Subject to the preceding qualifications a trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, or to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity. Upton, Trade-marks, 9; *Taylor* v. *Carpenter*, 2 Sandf. (N. Y.) Ch. 603.

Brands or stamps called trade-marks, says Waite, may consist of a name, figure, letter, form, or device adopted and used by a manufacturer or merchant in order to designate the goods that he manufactures or sells, and to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise. 6 Waite, Actions and Defences, 21.

Such a manufacturer or merchant who first adopts such a trade-mark, and is accustomed to affix the same to a particular fabric of his manufacture or sale to distinguish it from all others, has a property in it, and may maintain an action for damages if used by another, or he may restrain another from using it by application to a court of equity. *Hall* v. *Barrows*, 4 De G. J. & S. 149, 156; S. C. 12 W. R. 322, 323.

Judicial protection is granted in such a case upon the ground that the honest, skilful, industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption that has found favor with the public, and who by affixing to it some name, mark, device, or symbol which serves to distinguish it as his and from that of all others, shall receive the first reward of his honesty, skill, or enterprise, and shall in no manner and to no extent be deprived of the same by another who to that end appropriates the same or a colorable imitation of the same to his production, so that the public are or may be deceived or misled. *Wolfe*

v. *Barnett & Lion*, 24 La. An. 97; *Newman* v. *Alvord*, 15 N. Y. 189, 196; *Lee* v. *Haley*, Law Rep. 5 Ch. Ap. 155; *Blackwell* v. *Wright*, 73 N. C. 310, 313.

Nothing can be better established, says the Master of the Rolls, and nothing ought to be otherwise than fully established in a civilized country, than that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer. *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 440; Browne, Trade-marks, sect. 385; *Osgood* v. *Allen*, 1 Holmes, 185, 194.

When we consider, says Duer, the nature of the wrong that is committed when the right of property in a trade-mark is invaded, the necessity for the interposition of a court of equity becomes more apparent. He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks by deceiving the public to divert to his own use the profits to which the superior skill and enterprise of the other had given him an exclusive title, and endeavors by a false representation to effect a dishonorable purpose by committing a fraud upon the public and upon the true owner of the trade-mark. *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. (N. Y.) 599, 605; *The Collins Company* v. *Brown*, 3 Kay & J. 423, 428.

Thirty years and more before the suit was commenced the plaintiff company adopted the trade-mark in question and affixed the same to their improved manufacture of ticking, and it appears from the evidence that they have continuously from that date to the day the bill of complaint was filed used the same as the symbol to designate that peculiar manufacture, which of itself is sufficient to show, if any thing in the nature of proof can be, that the first defence set up in the answer ought to be overruled.

Much discussion of the second defence cannot be required, as the statement of the proposition that the complainants are estopped to ask relief in this case because they were partially unsuccessful in a prior suit against another party is quite sufficient for its refutation. Neither argument nor authority is necessary to show that it has no foundation in law or justice, and it is equally clear that the supposed analogy between an

admiralty decree *in rem* and a decree dismissing a bill in equity for the invasion of a trade-mark is illusory, unfounded, and without the slightest legal effect.

Suppose that is so, still the respondents deny that the trade-mark which they use is in the slightest degree fraudulent, or that it is calculated to deceive the public. They admit that they use the letters "A. C. A.," but they deny that in any other respect they have used the trade-mark adopted by the complainants.

Manufacturers and merchants have severally the unquestioned right to distinguish the goods they manufacture or sell by a peculiar mark or device, so that the goods may be known in the market as the product or sale of the owner of the trade-mark, or device, in order that they may thus secure the profits which the superior repute of the goods may be the means of giving to the producer or seller. *Gillott* v. *Esterbrook*, 48 N. Y. 374, 376.

Confirmation of that proposition is found in all the reported cases, and it is equally true that the owners of such trade-marks are entitled to the protection of a court of equity in the exclusive use of the symbols they have thus adopted and affixed to their goods, the foundation of the rule being that the public interest as well as the interest of the owner of the trade-mark requires that protection. 2 Story, Eq. Jur., sect. 951.

Such a party has a valuable interest in his trade or business, and having appropriated a particular label or trade-mark indicating to those who wish to give him their patronage that the article is made or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good-will of his customers or of the patrons of his trade or business by sailing under his flag without his authority or consent. *Partridge* v. *Menck*, 2 Barb. (N. Y.) Ch. 101.

Redress is given in such cases upon the ground that the party charged is not allowed to offer his goods for sale, representing them to be the manufacture of the first and real owner of the trade-mark, because by doing so he would be guilty of a misrepresentation, and would deprive the real owner of the

profits he might make by the sale of his goods which the purchaser intended to buy.

Compensation for such an injury was in early times given to the injured party by an action of deceit at common law, long before the Court of Chancery attempted to exercise jurisdiction to grant relief for such wrongful acts. In such an action it is doubtless true that the plaintiff is required to allege that the party charged infringed the trade-mark with a fraudulent intent, and to prove the charge as alleged, in order to secure a verdict and judgment for redress. Certain early cases in equity may be found where it is held that it is requisite that the allegation and proof in a chancery suit should be the same; but the practice in equity has long been settled otherwise, the rule now being that the injury the owner of the trade-mark suffers by the offering for sale in the market of other goods side by side with his, bearing the same trade-mark, entitles the real owner of the trade-mark to protection in equity, irrespective of the intent of the wrong-doer, it being held that the inquiry done to the complainant in his trade by loss of custom is sufficient to support his title to relief.

Neither will the complainant be deprived of remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trade-mark of the real owner were well aware that they were not of the complainant's manufacture. If the goods were so supplied by the wrong-doer for the purpose of being resold in the market, the injury to the complainant is sufficient to entitle him to relief in equity.

Nor is it necessary, in order to entitle the party to relief, that proof should be given of persons having been actually deceived, or that they bought goods in the belief that they were of the manufacture of the complainant, provided that the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *Edelston* v. *Edelston*, 1 De G. J. & S. 185; *McAndrew* v. *Bassett*, 4 id. 380; Sebastian, Trade-marks, 70.

Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such purchaser usually gives, and to cause him to purchase the one supposing it

to be the other. *Gorham Company* v. *White*, 14 Wall. 511; *McLean* v. *Fleming*, 96 U. S. 245, 256; Adams, Trade-marks, 107.

Difficulties attend the effort to describe with precision what resemblance is necessary to constitute an infringement, and perhaps it is not going too far to say that the term is incapable of exact definition as applied to all cases. Grant that, and still it is safe to say that no manufacturer or merchant can properly adopt a trade-mark so resembling that of another engaged in the same business as that ordinary purchasers buying with ordinary caution are likely to be misled.

Positive evidence of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled through the unjustifiable use of the trade-mark to sell a simulated article as and for the one which is genuine. *McLean* v. *Fleming*, *supra.*

Unless the simulated trade-mark bears a resemblance to that which is genuine, it is clear that the charge of infringement is not made out, and it is doubtless true that the resemblance of the simulated one to the genuine must be such that the former is calculated to deceive or mislead purchasers intending to buy the genuine goods; but it is a mistake to suppose that the resemblance must be such as would deceive persons seeing the two trade-marks placed side by side. Exact definition may not be attainable; but if a purchaser looking at the article offered to him, said Lord Cranworth, would naturally be led from the mark impressed on it to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark fraudulent. *Franks* v. *Weaver*, 10 Beav. 297.

Apply that rule to the case before the court, and it is sufficient to control the decision; but the Chancellor went much further, and said, that if the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, he thought that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of the owner as the actual copy of his device. *Seixo* v. *Provezende*, Law Rep. 1 Ch. 192, 196.

When the entire trade-mark is copied, the case is free of difficulty, as the rule is universal that the infringer is liable; but the question is, when may it be said that a trade-mark has been taken by another? Answers to that question are found in several cases, of which no one is more satisfactory than that given by the Master of the Rolls in a recent case. He says that a trade-mark to be taken need not be exactly copied, nor need it be copied with slight variations, but it must be *a substantial portion* of the trade-mark; to which he adds, that it has sometimes been called the material portion, but that, as he states, means the same thing, and he then remarks that it means the *essential portion* of the trade-mark, and finally concludes the subject by saying that "what the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description." *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 443; Cod. Dig., sect. 342.

Argument to show that that rule is applicable to the case before the court is unnecessary, as the proposition is self-evident; and if so, it is impossible to see how any one can vote to affirm the judgment of the Circuit Court. Beyond all question, the letters "A. C. A." are the essential feature of the trade-mark adopted by the complainants, and the respondents admit in their answer and in argument that they use the same three letters in the same combination.

Complete imitation is not required by any of the well-considered cases. Instead of that, it is well settled that the proof of infringement is sufficient if it shows even a limited and partial imitation, provided the part taken is an essential portion of the symbol. None of the cases show that the whole must be taken, nor is it necessary to show that any one has in fact been deceived, if the imitation is such as to prove that it is calculated to deceive ordinary purchasers using ordinary caution. Proof of actual intent to defraud is not required, but it is sufficient if the court sees that the trade-mark of the complainant is simulated in such a manner as probably to deceive the customers and patrons of his trade and business. *Filley* v. *Fassett*, 44 Mo. 168, 178; *Coats* v. *Holbrook*, 2 Sandf. (N. Y.) Ch. 586, 626.

Courts of justice do not always use the same language in

defining what is the requisite similarity in the two trade-marks to entitle the complainant to relief, but they substantially concur that if it be such that the public may be led to believe while they buy the goods of the respondent that they are buying an article manufactured by the complainant, the proof of similarity is sufficient. *Hirst* v. *Denham*, Law Rep. 14 Eq. 542, 552.

For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. *Wotherspoon* v. *Currie*, Law Rep. 5 Ap. Cas. 508–519; S. C. 27 L. T. N. S. 393.

Chancery courts will protect the property rights of a party in his trade-mark, and for its invasion the law will award compensation in damages. Legal redress will be accorded when it is shown that the symbol or device used by the wrong-doer is of such a character that by its resemblance to the established trade-mark of the complainant it will be liable to deceive the public and lead to the purchase of that which is not the manufacture of the proprietor, believing it to be his.

It is not necessary that the symbol or device should be a facsimile or a precise copy of the original trade-mark, or that it should be so close an imitation that the two cannot be easily distinguished by one familiar with the genuine device; but if the false or simulated one is only colorably different, or if the resemblance is such as may deceive a purchaser of ordinary caution, or if it is calculated to mislead the careless and unwary, and thus to injure the sale of the goods of the proprietor of the true device, the injured party is entitled to redress. *Colman* v. *Crump*, 70 N. Y. 573, 578; *Glenny* v. *Smith*, 11 Jur. N. S. 964.

Trade-marks usually exhibit some peculiar device, vignette, or symbol, in addition to the name of the party, which the proprietor had a perfect right to appropriate, and which, as well as the name, is intended as a declaration to the public

that the article is his property. Imitators frequently drop both the name and certain parts of the surroundings, and substitute their own name with a different vignette; but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded.

Proof of an intention to defraud is not required; but it is plain that the respondents acted with a design, and it would be absurd to suppose that they had no further object than the mere imitation of the trade-mark which they copied. On the contrary, it is obvious that they expected to gain an advantage in the sale of their goods by attaching their simulated device to fabrics resembling in appearance and quality the fabric of the complainants. Of course they meant to secure to their goods a preference in the market which they otherwise would not have commanded; and it is difficult, if not impossible, to see how any such advantage could be gained unless the simulated trade-mark would enable them to sell their fabrics as that of the injured party. *Amoskeag Manufacturing Co.* v. *Spear*, *supra*; *Fetridge* v. *Wells*, 13 How. (N. Y.) Pr. 386.

Proprietors of a trade-mark, in order to bring the same under the protection of a court of equity, are not obliged to prove that it has been copied in every particular by the wrongdoer. It is enough for them to show that the representations employed bear such resemblance to their symbol or device as to be calculated to mislead the public who are purchasers of the article, and to make it pass for the one sold by the true owner of the trade-mark. *Walton* v. *Crowley*, 3 Blatchf. 440–447.

Candid men cannot read the record in this case without being forced to the conclusion that the respondents took the essential feature of the complainants' trade-mark, which they had used for forty years to designate the fabric of ticking which they manufactured, and which had become known throughout the United States as the authorized symbol to indicate that description of goods; and if so, it follows to a demonstration that the decree of the Circuit Court should be reversed.

TRUST COMPANY v. NATIONAL BANK.

1. The defences of the maker of a promissory note can be cut off only by the payee's indorsement of it before maturity.
2. A guaranty written upon it by the payee is not such an indorsement.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Samuel W. Packard for the appellant.

Mr. J. A. Sleeper and *Mr. H. K. Whiton*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

This case, as made by the bill, answers, replications, and proofs, is as follows: On the twenty-fourth day of September, 1874, the First National Bank of Wyandotte, Kansas, made its promissory note at Chicago, Illinois, in these words: —

"$5,000. CHICAGO, ILLINOIS, Sept. 24, 1874.

"Four months after date we promise to pay to Cook County National Bank, of Chicago, or order, five thousand dollars, with interest at the rate of —— per cent per annum after due, value received, all payable at Cook County National Bank.

"B. JUDD,

"*Cashier 1st Nat'l Bank, Wyandotte, Ka's.*

"$6,000 Wyandotte Co. and City bonds as collateral."

The note was made and delivered to the Cook County Bank, in pursuance of an arrangement between that bank and Judd, the cashier of the Wyandotte Bank, by which it was agreed the latter should execute a four months' note for $5,000, with security, and have the same discounted by the Cook County Bank, and the proceeds placed to the credit of the Wyandotte Bank, but not to be drawn against so as to reduce the credit for such proceeds below $4,000, — such note to remain with the Cook County Bank, and to be surrendered to the maker on the renewal or close of the account. It was distinctly understood between the officers of the two banks when the note was given that it should be held by the Cook County Bank as a memorandum, and not be negotiated or separated from the

Wyandotte city and county bonds for $6,000 accompanying it, which were delivered contemporaneously with it as collaterals. Accordingly, the sum of $4,000, part of the proceeds of the discount, was suffered to remain on deposit to the credit of the Wyandotte Bank, until the Cook County Bank failed, became insolvent, and passed into the hands of a receiver. At the time of such failure and the appointment of a receiver there was also an additional credit of $868 due from the Cook County Bank to the Wyandotte Bank. When, therefore, the note matured there was due from the payee to the maker of the note the sum of $4,868. But before its maturity, to wit, on the seventh day of October, 1874, the Cook County Bank, in violation of its agreement above mentioned, passed the note to the New York State Loan and Trust Company, by which it was discounted, without any knowledge of any defence which the Wyandotte Bank had against it, or any knowledge of the origin of the note and of the agreement between the two banks, other than what the face of the note revealed.

The note was protested when it fell due, and it is now held by the Central Trust Company of New York, the receiver of the New York State Loan and Trust Company, and the collaterals, the municipal bonds, are held still by the Cook County Bank.

This bill has been filed to compel its surrender and the surrender of the Wyandotte city and county bonds on the payment of $132, the difference between $5,000 and $4,868, the sum standing to the credit of the Wyandotte Bank against the payee, the claimant offering to pay that sum.

In view of these facts, fairly deducible from the evidence, it is manifest that, as between the complainant and the Cook County Bank, there is a perfect defence against the note to the extent of $4,868, the sum standing to the credit of the Wyandotte Bank due from the payee. On the payment of $132 the maker of the note has a clear equity to have it surrendered, together with the municipal bonds held as collaterals.

But it is claimed that the Trust Company having received the note before its maturity, and having discounted it in the usual course of business without any knowledge of any equities or defence against it, is entitled to hold it free from any defence

which the maker could set up against the payee; that is, against the Cook County Bank.

A large portion of the argument before us has been expended upon the questions whether, inasmuch as the note was given by the cashier of the Wyandotte Bank at Chicago, and was made payable at a future day, it was not void under the general banking law. We pass those questions as unnecessary to be considered. If it be conceded that the note was valid at its inception, it is certainly true the maker had a good defence against it while it was in the hands of the payee, and we do not perceive that the manner in which the Trust Company or its receiver obtained it puts them or either of them in any better position than the payee occupied.

The note was not indorsed to the Trust Company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the Trust Company would hold it unaffected by any equities between the maker and the payee. But instead of an indorsement, the president of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the Trust Company. The note was not even assigned. There was written upon it only the following: —

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at ten per cent per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

"B. F. ALLEN, *Pres't.*"

In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason perhaps it was not indorsed. That a guaranty is not a negotiation of a bill or note as understood by the law merchant, is certain. *Snevily* v. *Ekel*, 1 Watts & S. (Pa.) 203; *Lamourieux* v. *Hewitt*, 5 Wend. (N. Y.) 307; *Miller* v. *Gaston*, 2 Hill (N. Y.), 188. In this case, the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the Trust Company. Being express, it can raise no appli-

cation of any other contract. *Expressum facit cessare tacitum.* The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defences of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. 2 Parsons, Notes and Bills, 46 *et seq.*, notes.

At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of $132.

Decree affirmed.

THOMAS v. RAILROAD COMPANY.

1. The powers of a corporation organized under a legislative charter are only such as the statute confers; and the enumeration of them implies the exclusion of all others.
2. A lease by a railroad company of all its road, rolling-stock, and franchises for which no authority is given in its charter is *ultra vires* and void.
3. The ordinary clause in the charter authorizing such a company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads confers no authority to lease its road and franchises.
4. The franchises and powers of such a company are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration for granting them. A contract by which the company renders itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation without the consent of the State, violates its charter and is forbidden by public policy. It is, therefore, void.
5. The fact that the legislature, after such a lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity.
6. Where a lease of this kind for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle that executed contracts originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of covenant, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts: —

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings, and rolling-stock to them for twenty years from the 1st of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof; that in the event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive, and binding upon the parties.

On the 10th of April, 1867, the legislature of New Jersey passed an act entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company.'" It was therein enacted that it should be unlawful for the directors, lessees, or agents of said railroad to charge more than the sums therein named for passengers and freight respectively. The plaintiffs claim that at the date of the passage of this act it was well known that they were acting under the said agreement of 8th October, 1863.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Mill-

ville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the legislature of New Jersey passed an act whereby it was enacted that, upon the fulfilment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by that act were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the 1st of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof to and by the plaintiffs, was adjudged to be the sum of $159,487.07; and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted and sued out this writ.

They assign for error that the court below erred, —

1. In excluding from the consideration of the jury the offered evidence of the said agreement between the Millville and Glassboro Railroad Company and the plaintiffs; of the acts of assembly of New Jersey, one an act to incorporate the Millville and Glassboro Railroad Company, approved the 9th of March, 1859, and another an act entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company,' passed the tenth day of April, 1867," and the acts referred to therein; of the fact that it was well known at the date of the last-named act that the plaintiffs were lessees acting under the said contract and agreement; and of all the other acts of the legislature of the State of New Jersey relating to the West Jersey Railroad Company, and to the Millville and Glassboro Railroad Company.

2. In directing the jury that their verdict must be for the defendant.

3. In entering judgment upon the verdict for the defendant.

Mr. George W. Biddle and *Mr. A. Sydney Biddle* for the plaintiffs in error.

I. The contract of 8th October, 1863, was *intra vires* of the Millville and Glassboro Railroad Company, because authorized by the act of incorporation.

First, It was expressly authorized by the act of incorporation, the thirteenth section of which declares "that it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts."

A supplement to that act, approved April 10, 1867, sustains this position, for it enacts "that it shall be unlawful for the directors, *lessees*, or *agents* of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one

half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: *Provided*, that nothing contained in this act shall deprive the said railroad company, *or its lessees*, of the benefits of the provisions of an act entitled 'An Act relative to freights and fares on railways in the State,' approved March 4, 1858, and applicable to all other railroads in this State."

Second, The contract in question was impliedly authorized by the act of incorporation. It was, in fact, a mere appointment of agents or employés to run the road, making it for their advantage to economize and advance the interests of the road by paying them upon a sliding scale. Although the words "lease" and "lessees" are employed, its terms show that the plaintiffs were in no respect lessees in a legal sense. It was confined to twenty years. The company could put an end to it and retake possession upon three months' notice. The contract would terminate by the death of either of the so-called lessees, or by their omission to make the regular payments. They were required forthwith to discharge from their employment any person employed by them whom the company, through its directors, should wish removed. The plaintiffs were to pay to the company one-half the gross amount received, and to secure their covenant to keep the rolling-stock, &c., in good repair, by depositing yearly a sum of $10,000 with a trustee, who acted as agent for the company. This case essentially differs from those in which it has been held that a contract whereby a railroad company engages to employ the corporate funds in a manner not authorized by the charter is void, and that its execution will, upon the application of a shareholder, be restrained by a court of chancery, and from those in which such a contract has by a common-law court been declared to be impliedly forbidden by the legislature, and therefore void as against public policy.

This fund was to be appropriated under the directions of the company for repairing and replacing the track, road-bed, and rolling-stock. Any dispute as to what were current repairs (to which no portion of this fund was to be applied), and what were repairs to perpetuate the road and rolling-

stock, was to be settled by an agent of the company. This fund was to be applied by the trustee upon the order of, and only to the purposes designated by, the Millville company.

No definition of a lease can be framed which will comprehend such an agreement. It was, in truth, an appointment of three agents to take charge of a small road a few miles long.

Third, The objection of *ultra vires* cannot be maintained in this case. The funds of the corporation were not engaged outside of the scope of the object of its charter; and although it devolved some of its administrative duties to others, the supervision of the directors was not withdrawn, and the rights of the shareholders were carefully secured. *Robbins* v. *Embry*, 1 Smed. & M. (Miss.) Ch. 268, 269; *Llanelly Railway & Dock Co.* v. *London & Northwestern Railway Co.*, Law Rep. 8 Ch. 942.

An instrument providing that a railroad shall be run, not directly by the corporation, but by agents appointed by it, has never been declared invalid. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459. It is not a valid objection that the plaintiffs should be primarily liable to the public. *Langley* v. *Boston & Maine Railroad*, 10 Gray (Mass.), 103. The corporation remained bound. It has never attempted to evade the duties nor escape from the responsibilities imposed by its charter; and it could not successfully do so. *York & Maryland Line Railroad Co.* v. *Winans*, 7 How. 30; *Bissell* v. *The Michigan & Northern Indiana Railroad Co.*, 22 N. Y. 258.

II. The contract was authorized, inasmuch as it was neither directly nor impliedly forbidden; was germane to the object for which the company was formed, and would have been valid at common law, if made by a corporation created by charter.

A corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.

The real position being in such cases, Has the charter pro-

hibited the contract sought to be enforced; if it has, has the prohibited portion been completely executed; if it has not, have the partners, the shareholders in the corporation, ratified the act which their agents, the directors, were, as against them, unauthorized to perform? *Taylor* v. *Chichester & Midhurst Railway Co.*, Law Rep. 2 Ex. 356; *The Mayor of Norwich* v. *Norfolk Railway Co.*, 4 El. & Bl. 397; *East Anglian Railways Co.* v. *The Eastern Counties Railway Co.*, 11 C. B. 775; *Chambers* v. *Manchester & Milford Railway Co.*, 5 B. & S. 588; *South Wales Railway Co.* v. *Redmond*, 10 C. B. N. S. 675; *Bateman* v. *Mayor, &c. of Ashton-under-Lyne*, 3 H. & N. 323; *Shrewsbury & Birmingham Railway Co.* v. *The Northwestern Railway Co.*, 6 H. of L. 113, 136.

The authorities establish the proposition that a contract not forbidden may be enforced, where the shareholders have assented. In this case there was a prior unanimous assent and a subsequent unanimous ratification, and the illegal part, if any, of the contract has been completely executed.

III. The defence of *ultra vires* is inadmissible to an action against a corporation upon its contract duly made, where (if not wholly executed) all the shareholders have acquiesced in its performance, or where the contract has been wholly performed by the other party without objection on the part of the corporation, or any of the shareholders. *Graham* v. *Birkenhead Railroad Co.*, 2 Mac. & G. 146; *Phosphate of Lime Company* v. *Green*, Law Rep. 7 C. P. 43, 62, 63; *The Erie Railway Co.* v. *The Delaware, Lackawanna, & Western and The Morris & Essex Railroad Companies*, 21 N. J. Eq. 283, 289; *Riche* v. *The Ashbury Railway Carriage & Iron Co.*, Law Rep. 9 Exch. 244.

Where the transaction is complete, and nothing remains to be done by the party seeking relief, the plea of *ultra vires* is not available by the corporation in an action brought against it for not performing its side of the contract. *The Silver Lake Bank* v. *North*, 4 Johns. (N. Y.) Ch. 370, 373; *Gold Mining Company* v. *National Bank*, 96 U. S. 640; *National Bank* v. *Matthews*, 98 id. 621; *Steamboat Company* v. *McCutcheon & Collins*, 13 Pa. St. 13; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490, 495; *Bissell* v. *Michigan Southern & Northern Indiana*

Railroad Companies, 22 id. 258, 272, 273; *Whitney Arms Company* v. *Barlow*, 63 id. 62, 68, 69; *Steam Company* v. *Weed*, 17 Barb. (N. Y.) 378; *Moss* v. *Mining Company*, 5 Hill (N. Y.), 137; *Grant* v. *Henry Clay Coal Co.*, 80 Pa. St. 208, 218; *Oil Creek & Allegheny River Railroad Co.* v. *Pennsylvania Transportation Co.*, 83 id. 160; *McCluer* v. *Manchester & Lawrence Railroad*, 13 Gray (Mass.), 124; *Gifford* v. *New Jersey Railroad Co.*, 2 Stock. (N. J.) 177; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 476; *Smith* v. *Sheeley*, 12 id. 358, 361; *Kelly* v. *Transportation Company*, 3 Oreg. 189; *Weber* v. *Agricultural Society*, 44 Iowa, 239; *Showalter* v. *Pirner*, 55 Mo. 233; *Chambers* v. *City of St. Louis*, 29 id. 543; *Land* v. *Coffman*, 50 id. 243; *Wade* v. *Colonization Society*, 7 Smed. & M. (Miss.) 663, 697; *Robbins* v. *Embry*, *supra*.

IV. If the contract were originally *ultra vires*, it was ratified, and, for the future, authorized by the act of 10th April, 1867. P. L. of New Jersey of 1867, p. 915; Record, 40.

It is a well-settled principle of law that statutes, by implication, ratify and legalize former unauthorized proceeding of a corporation, where the unlawful act is mentioned or referred to in them as a proper one; and if the act be a continuing one, it is authorized for the future. *The Ecclesiastical Commissioners for England* v. *Northeastern Railway Co.*, 4 Ch. Div. 845.

Mr. Samuel Dickson, contra.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The ground on which the court held the contract to be void and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by the plaintiffs that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, &c., on the one side, and

a recompense by rent or other consideration on the other." 4 Bac. Abr. 632.

"Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments are included in the common-law rule." Bouv. L. D., "Lease;" 1 Wash. Real Prop. 310.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one-half of all the gross earnings of the road. The usual provision for a right of re-entry on the failure to perform covenants in addition to the special right to terminate the lease on notice, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, are inserted in the instrument.

The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved. A solitary exception to this statement, of no value in the actual control of affairs, is found in the sixth clause of the lease, which covenants that the lessees will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the Circuit Court devolved the duty of proving one of the following propositions: —

1. The contract was within the powers granted to the railroad company by the act of the New Jersey legislature under which it was organized.

2. That if this be not established, the lease was afterwards ratified and approved by another act of that legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: —

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts."

This is no more than saying, "you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies.

In *The Ashbury Railway Carriage & Iron Co.* v. *Riche*, decided in the House of Lords in 1875 (Law Rep. 7 H. L. 653), the memorandum of association, which, as Lord Cairns said, stands under the act of 1862 in place of a legislative charter, thus described the business which the company was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire, railway-carriages and

engines, and all kinds of railway plant, fittings, machinery, and rolling-stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on its agreement with Riche, the contractor, and the contract was held valid in the Exchequer Chamber by a majority of the judges, on the ground that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted.

The House of Lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which describes the parties as engaging in furnishing nearly all the materials, machinery, and rolling-stock which enter into the construction of a railroad and its equipments, and then empowers them to carry on the business of *mechanical engineers and general contractors*, cannot authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it and with the lease to part with all its powers to another company or to individuals. We do not think there is any thing in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel have relied largely on the decisions of those courts. Among the cases cited by both sides is *The East Anglian Railways Co.* v. *The Eastern Counties Railway Co.*, 11 C. B. 775.

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other railroads whose companies had introduced into Parliament a bill for consolidation under the name of East Anglian Railways Company, and to assume the payment of the parliamentary expenses of this act of consolidation.

This covenant was held void as beyond the power conferred by the charter. "They cannot," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857 in delivering the opinion of the House of Lords in *Eastern Counties Railway Co.* v. *Hawkes* (5 H. L. Cas. 331); and it is there stated that it was also acted on and recognized in the Exchequer Chamber in *McGregor* v. *The Deal & Dover Railway Co.*, 22 LAW J. N. S. Q. B. 69;

18 Q. B. 618. Both these cases are cited approvingly in the opinion of Lord Cairns in the Ashbury Company, on appeal in the House of Lords.

This latter case, as decided in the Exchequer Chamber (Law Rep. 9 Exch. 224), is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hatherly, and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in *The York &*

Maryland Line Railroad Co. v. *Winans*, 17 How 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman* v. *Rufford*, 1 Sim. N. S. 550; *Winch* v. *B. & L. Railway Co.*, 13 L. & Eq. 506."

And in the case of *Black* v. *Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130, Chancellor Zabriskie says: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." p. 399. For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the legislature of New Jersey has given her consent by an act which amounts to a ratification of this lease.

That act is entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company,'" approved April 10, 1867; and its only purpose was to

regulate the rates at which freight and passengers should be carried. It reads as follows: —

"That it shall be unlawful for the directors, *lessees*, or *agents* of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: *Provided*, that nothing contained in this act shall deprive the said railroad company, *or its lessees*, of the benefits of the provisions of an act entitled 'An Act relative to freights and fares on railways in the State,' approved March 4, 1858, and applicable to all other railroads in this State."

It may be fairly inferred that the legislature knew at the time the statute was passed that plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the railroad.

The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "lessees" in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances,

where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish* v. *Wheeler* (22 N. Y. 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court.

Judgment affirmed.

MR. JUSTICE BRADLEY did not sit in this case.

EMPIRE v. DARLINGTON.

1. Pursuant to the provisions of an act of the General Assembly of Illinois, approved Feb. 28, 1867, and to the result of a popular election duly called, and held June 3, 1867, a township subscribed $50,000 to the capital stock of a railroad company, created under the laws of that State, and it issued its bonds in payment therefor. On Aug. 20, 1869, that company was consolidated with another in Indiana, the new company assuming another name, and, in harmony with the object of said act, providing for the construction of a continuous line of road from a point in Indiana to the initial point of the road in Illinois. An election held in the township, Oct. 12, 1869, for the purpose of ascertaining the sense of its people upon the proposition to subscribe, upon certain conditions, $25,000, for additional stock in aid of the construction and completion of the road of the consolidated company, resulted in favor of the subscription, which being made, bonds to that amount in the customary form, bearing date March 20, 1870, and signed by the supervisor and clerk, were issued in the name of the township and delivered to the company. Each contains a recital that it is issued under and by virtue of a law of the State of Illinois, approved Feb. 28, 1867, and in accordance with the vote of the electors of said township, at the special election held Oct. 12, 1869, in accordance with said act; and it pledges the faith of the township for the payment of the said principal sum and interest as aforesaid. The twelfth section of the act of Feb. 28, 1867, declares that "to further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum, not exceeding $250,000." *Held*, 1. That the power of the township to subscribe to the capital stock of the company was not exhausted by the subscription first made after the election held

June 8, 1867. 2. That under said section the power of the township to subscribe was limited in amount only. 3. That the consolidation of the company was authorized by the general statute of Illinois of Feb. 28, 1854. 4. That the power of the township to make the additional subscription was, in its essence, a right and privilege conferred upon the company chartered by the act of 1867 which, under the act of 1854, passed to the consolidated company.

2. The court affirms its ruling in *Brooklyn* v. *Insurance Company* (99 U. S. 362), that a decree rendered in a county court in a suit against a railroad company and others, declaring that municipal bonds and coupons issued to the company are null and void, does not affect the holders of them who did not appear, and had only constructive notice of the suit.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Under the provisions of an act of the legislature of Illinois, approved Feb. 28, 1867, and in conformity to the result of a popular election duly called, and held on the 3d of June, 1867, the township of Empire in McLean County, in that State, made a subscription of $50,000 to the capital stock of the Danville, Urbana, Bloomington, and Pekin Railroad Company, a corporation created under the laws of Illinois. That company had by its charter power to locate, construct, and complete a railroad from Pekin, through, or as near as practicable to, certain designated towns, to the eastern boundary of the State.

In payment of the subscription, bonds of the township, of like amount, were issued and delivered to the company.

On the twentieth day of August, 1869, that company consolidated with the Indianapolis, Crawfordsville, and Danville Railroad Company, an Indiana corporation, the consolidated company assuming the name of the Indianapolis, Bloomington, and Western Railway Company. The consolidated railroad formed a continuous line of road from Indianapolis, Ind., to Pekin, Ill.

On the 12th of October, 1869, an election was held in the township of Empire for the purpose of ascertaining the sense of its people upon the proposition to subscribe, upon certain conditions, the sum of $25,000, as additional stock in aid of the construction and completion of the Indianapolis, Bloomington, and Western Railroad. The election resulted in favor of the subscription, which being made, bonds to that amount

were issued in the name of the township and delivered to the company.

The bonds were in the customary form, dated March 20, 1870, and signed by the township supervisor and clerk. Each one contained a recital that it was issued "under and by virtue of a law of the State of Illinois, entitled 'An Act to amend the articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same,' approved Feb. 28, 1867, and in accordance with the vote of the electors of said township, at the special election held Oct. 12, 1869, in accordance with said act. And the faith of the township of Empire is hereby pledged for the payment of the said principal sum and interest as aforesaid."

Darlington, who is the holder of some of the bonds and coupons issued March 20, 1870, brought this action against the township to recover thereon. It was admitted in the court below that on April 29, 1878, the Circuit Court of McLean County, Illinois, upon the application of certain tax-payers of the said township, enjoined the further payment of the principal or interest, or any part of the bonds or coupons issued in payment of the said subscription of $25,000; that the bondholders were made parties to that suit by the name of unknown owners and holders; that they were notified of its pendency by publication only; and that subsequently a decree was rendered declaring said bonds and coupons void, and perpetually enjoining the assessment and collection of taxes for the purpose of paying them.

The defences set up by the township are stated in the opinion of the court.

A jury having been waived, the court below rendered a judgment in favor of the plaintiff for $8,178.05 and costs, whereupon the township sued out this writ of error.

Mr. Lawrence Weldon for the plaintiff in error.
Mr. Shelby M. Cullom, contra.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

The present action involves the validity of the bonds and

the coupons thereto attached of the $25,000 issue, some of which are held by the defendant in error.

Their validity is assailed upon several grounds, each of which will be briefly examined.

It is contended that the election held on the 3d of June, 1867, under the charter of the Danville, Urbana, Bloomington, and Pekin Railroad Company, whereby the subscription of $50,000 was made and bonds issued in payment thereof, exhausted the power of the township under that charter, and that any additional subscription was without authority of law.

This position is clearly untenable. The twelfth section of the charter of the railroad company furnishes a conclusive answer to this proposition. That section declares that "to further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum, not exceeding $250,000." That the plaintiff in error belongs to the class of townships described in that section, is not disputed. Its right, consequently, to make subscriptions, from time to time, until they reached the prescribed limit, seems to be too clear to require argument in its support. The charter contains no word, clause, or section indicating that the authority of the township to make subscriptions ceased after the first subscription. The legislature fixed a limit beyond which the township could not go in its subscriptions to the company in question, but left it free — the people consenting by popular vote — to make subscriptions in such sums and at such times as it deemed necessary or proper, within the aggregate amount named in the section which has been quoted. *People* v. *Town of Waynesville*, 88 Ill. 469.

The next proposition urged upon our attention is that by the consolidation to which we have referred a new corporation was created by the name of the Indianapolis, Bloomington, and Western Railway Company, and the original companies dissolved; that there was no power vested in the electors, the corporate authority of the township of Empire, under the charter of the Danville, Urbana, Bloomington, and Pekin Railroad

Company, to hold an election, to subscribe stock and issue bonds to that new company. This proposition is equally untenable with the first.

By a general statute of Illinois, passed Feb. 28, 1854, and in force as well at the date of the charter of the Danville, Urbana, Bloomington, and Pekin Railroad Company, as when it was consolidated with the Indianapolis, Crawfordsville, and Danville Railroad Company, express authority was conferred upon all railroad companies then organized or thereafter to be organized, which then had or might thereafter have their termini fixed by law, whenever their road or roads intersected by continuous lines, to "consolidate their property and stock with each other, and to consolidate with companies out of this [that] State, whenever their lines connect with the lines of such companies out of this [that] State." That statute further provided that the consolidated company, by the name agreed upon, should be a body corporate and politic, and "shall have all the powers, franchises, and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed, within the State of Illinois." Ill. Rev. Stat. Gross (3d ed.), pp. 537, 538.

It thus appears that whatever powers, franchises, and immunities were enjoyed by the Danville, Urbana, Bloomington, and Pekin Railroad Company, under its charter, passed, upon the consolidation, to the consolidated company. The power of the township of Empire to make, as we have held it could, an additional subscription, beyond the original of $50,000, was, in its essence, a right and privilege of the railroad company which, under the general law of the State, passed to the consolidated company. *County of Scotland* v. *Thomas*, 94 U. S. 682; *County of Henry* v. *Nicolay*, 95 id. 619. It was evidently so understood by the parties concerned; for while the bonds very properly refer to the act of Feb. 28, 1867 (which is the charter of the Danville, Urbana, Bloomington, and Pekin Railroad Company), as the statute which specifically authorized their issue, the petition of citizens asking an election, and the notice of the election of Oct. 12, 1869, distinctly show that the additional subscription of $25,000 to be voted on was for additional stock in aid of the construction and completion, not

of the Danville, Urbana, Bloomington, and Pekin Railroad, but "of the Indianapolis, Bloomington, and Western Railroad." If the popular vote had been, in terms, in favor of a subscription to the capital stock of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and the subscription had been made in that form, there would be some reason to contend that the subscription would have been a nullity, since no such company then had a distinct separate existence. But when, as here, the vote was taken, and the subscription made, with direct reference to the construction and completion of the original line by the consolidated company, which had previously succeeded to all the powers, franchises, and immunities of the Danville, Urbana, Bloomington, and Pekin Railroad Company, there would seem to be no ground whatever to question the validity of the bonds issued and delivered to the company in payment of the subscription.

It is scarcely necessary to say that the decree in the Circuit Court of McLean County, Illinois, rendered in 1878, perpetually enjoining the assessment and collection of taxes for the purpose of paying the bonds and coupons in question, and declaring said bonds and coupons to be void, did not conclude the rights of the defendant in error. The bondholders were proceeded against by constructive service, as "unknown owners and holders." The defendant in error was not served with process, nor did he appear. If the decree was binding upon the citizens and courts of Illinois, as to which we express no opinion, it was ineffectual as to bondholders residing in other States, who were proceeded against only by constructive service. *Brooklyn* v. *Insurance Company*, 99 U. S. 362.

Judgment affirmed.

BAST v. BANK.

March 1, 1876, A., by way of collateral security for his notes of even date, payable four months thereafter, made an instrument in writing assigning to B., the payee of them, a judgment against C., and authorizing him to sell it, in case they should not be paid at maturity, and apply the proceeds to the payment of them. C., at said date, had sufficient personal property to satisfy the judgment. Execution was issued June 19, but that property had been previously exhausted by the levy of other executions. In a suit by B. against A. on the notes, — *Held*, 1. That B. was not bound by the terms of the assignment to take steps for the collection of the judgment before the maturity of the notes. 2. That, in the absence of accident, mistake, or fraud, evidence was not admissible to show his parol agreement, made contemporaneously with the assignment and as part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. F. W. Hughes for the plaintiff in error.

Mr. R. M. Schick and *Mr. G. R. Kaercher*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an action on three notes made by Bast, the plaintiff in error, to the First National Bank of Ashland, defendant in error, dated March 1, 1876, and payable four months after date, two being for $2,000 each, and the other for $3,481.79. Simultaneously with the delivery of the notes the following assignment in writing was made: —

"Know all men by these presents, that I, Emanuel Bast, do hereby transfer and assign to William Torrey, cashier, of Ashland, Pennsylvania, a certain judgment of June Term, 1875, in Court of Common Pleas of Schuylkill County, No. 1232, in which the First National Bank of Ashland is plaintiff, and the Ringgold Iron and Coal Company is defendant, and the three several drafts upon which the said judgment was obtained as collateral security for the payment of two notes of $2,000 each, and one for $3,481.69, made by me to order of William Torrey, cashier, dated March 1, 1876, payable in four months after date, and upon failure on my

part to pay said notes at maturity, or at the maturity of time, for which the same may be renewed, then the said Torrey, cashier, is hereby authorized and empowered to sell the same at public sale, after ten days' notice, to me, and apply the proceeds thereof to payment of my said notes, and in case the proceeds of same shall not be sufficient to pay said notes, then I promise to pay any balance that may be due.

"In witness whereof, I have hereunto set my hand and seal, this first day of March, 1876.

"EMANUEL BAST. [SEAL.]

"Witness: A. P. SPINNEY, S. HENRY NORRIS."

Bast was at the time the owner of the judgment assigned, on which there was due the exact amount of his notes, and on each of the notes was an indorsement to the effect that the judgment assigned was held as collateral. There was no legal impediment in the way of an immediate issue of execution on the judgment, and until May 19, 1876, the Iron and Coal Company, the judgment defendant, had unincumbered personal property subject to levy and sale on execution sufficient to pay the amount that was due. No execution was issued until June 19, and before that time the property of the company had all been exhausted by the prior levy of executions issued on other judgments. Bast made no demand on the bank to issue execution on his judgment at any time before June 19.

After the maturity of the notes the judgment was sold pursuant to the authority contained in the assignment and $2,141 realized, which was applied towards the payment of the notes. This suit was brought to recover the balance due after this application was made.

Bast filed an affidavit of merits, which in Pennsylvania has the effect, in cases of this class, of a plea, in which he alleges, 1, that it was the duty of the bank under the written assignment to have issued execution on the judgment prior to the time it did; and, 2, "that simultaneously with his delivery of said notes to said bank as aforesaid, as well as said assignment of said judgment as collateral security for the same, it was agreed between deponent (Bast) and said bank, as part of the transaction, that said bank would issue execution upon said judgment and proceed to collect the same whenever the money

could be made thereon." He then claimed that, "by reason of the supine neglect of the plaintiff in not issuing execution as aforesaid, the said judgment assigned to it as aforesaid as collateral security for the payment of the notes sought to be collected in this case was lost and became worthless, whereby deponent suffered damages to an amount equal to the full amount due upon the notes in suit."

The court below held that the defence set up in the affidavit of merits was insufficient in law, and gave judgment for the bank for $5,440.46, the balance remaining due on the notes.

To reverse this judgment this writ of error has been brought.

Two questions are presented by the defence in this case.

1. Was the bank bound by the terms of the written assignment to take steps for the collection of the judgment before the maturity of the notes?

2. Was parol evidence admissible to prove the alleged promise, made simultaneously with the assignment and as part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon?

1. As to the assignment.

No obligation to collect was in terms put on the bank by the writing. On the contrary, the only power conferred on the bank in reference to the judgment was to sell if the notes were not paid at maturity, or at the maturity of their renewals. All parties seem to have contemplated delay in the collection, and Bast seems also to have been especially careful to retain in his own hands the power to withhold execution if he saw fit. Until a sale was made under the express power granted for that purpose he continued the actual owner of the judgment, subject only to the lien of the bank to secure the payment of his notes. So far as any thing appears on the face of the written instrument, he retained full control of the collection by legal process; but whether that be so or not, he certainly could call on the bank at any time before a sale to take the necessary steps, or permit him to do so, to enforce its collection, or to secure and preserve such priority of lien as the judgment was entitled to over other judgments or executions thereon. If the bank had failed to comply with his demand, and loss had

ensued, other questions than such as are now presented might have arisen. But upon the face of the assignment we are clearly of the opinion that the bank put itself under no obligation to collect except on the demand of Bast. Any attempt to do so before the maturity of the notes, without his consent, would be a direct violation of the terms of the instrument under which it acquired all its rights.

2. As to the parol evidence.

No principle of evidence is better settled at the common law than that when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, "conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing." 1 Greenl. Evid., sect. 275. In Pennsylvania, the stringency of this rule has been very considerably relaxed, but we have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument. In *Martin* v. *Berens* (67 Pa. St. 463), the court say: "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative." In this case the Pennsylvania decisions are extensively reviewed, and the exceptions to the rule of the common law which they recognize carefully stated, but the conclusion is that, "as a general rule, it (parol evidence) is inadmissible to contradict or vary the terms of a written instrument." Again, in *Bernhart* v. *Riddle* (29 id. 96) this language is used: "Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds. What if parol evidence prove, never so clearly, that they used such and such words in making their bargain; the writing signed, if it contain not those words, is final and conclusive evidence that they were set aside in favor of the other expressions that *are* found

in the written instrument. And hence this rule of law is only a conclusion of reason, that that medium of proof is most trustworthy which is most precise, deliberate, and unchangeable." This is the rule, it was said, which prevails in reference "to the *terms* in which the writing is couched," and that "evidence to explain the *subject-matter* of an agreement is essentially different from that which varies the terms in which a contract is conceived." It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument, but in *Anspach* v. *Bast* (52 id. 356), it is expressly declared that "no case goes the length of ruling that such evidence is admitted to change the promise itself, without proof or even allegation of fraud or mistake. The contrary has been repeatedly decided." To the same effect is the case of *Hacker* v. *National Oil Refining Co.* (73 id. 93), as well as many others that might be cited.

In the present case, as we have seen, the contract which the parties reduced to writing is, in effect, that the bank should not, before the maturity of the notes, take measures to collect the judgment assigned without the consent of Bast. The offer was to prove a contemporaneous parol agreement that it should do so. This is a clear contradiction of the *terms* of the written contract, in a matter where there is no pretence of ambiguity, and where there has been no fraud or mistake.

We think the court below was right in giving judgment for the bank, notwithstanding the affidavit of merits.

Judgment affirmed.

RAILROAD COMPANY v. WHITE.

Where, upon an examination of the whole record of a civil suit or proceeding, it appears that the opinions of the judges of the Circuit Court were not actually opposed upon any question of law material to the determination of the cause, and the amount in controversy is not sufficient to give this court jurisdiction, the writ of error will be dismissed, even though a disagreement in opinion be certified in form.

ERROR to the Circuit Court of the United States for the District of Colorado.

The facts are stated in the opinion of the court.

Mr. H. M. Teller for the plaintiff in error.

Mr. John Q. Charles, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a writ of error brought by the Colorado Central Railroad Company, the defendant below, to reverse a judgment against it for less than $5,000. The record shows that after a verdict in favor of the plaintiff below the defendant moved for a new trial; and on that motion the question arose, whether, "under the facts and circumstances shown in evidence," a certain instruction of the court to the jury "was or was not erroneous." The record then proceeds as follows: "On which question the opinions of the judges were opposed, and final judgment entered on a verdict for the plaintiff. Whereupon, on motion of the defendants, by its counsel, that the point on which the disagreement so happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing statement of the pleadings and the facts, which is made under the direction of the judges, be certified according to the request of the defendant, by its counsel, and the law in that case made and provided." The certificate thus ordered is signed by the circuit judge and the district judge. As the law now stands, if the judges in the Circuit Court disagree, a judgment must be entered in accordance with the opinion of the presiding judge, who, in this

case, was the circuit judge. Rev. Stat., sect. 650. If he had been of the opinion that the instruction was wrong, the order necessarily would have been in favor of granting a new trial. Because the new trial was not granted, therefore, we must conclude that he thought the instruction right. To bring about a disagreement under these circumstances, the district judge must have held that the instruction was wrong; but, instead of that, we find his opinion in the record, apparently delivered in disposing of the motion for a new trial, in which he maintains with much force the correctness of the instruction.

In view of these facts, as the amount in dispute is less than our jurisdiction requires, we must decline to take cognizance of the case. If the judges below are not able to agree upon the decision of any question of law which is material to the determination of a cause presented to them, our jurisdiction may be invoked to settle the differences; but in such cases, if it appears upon an examination of the whole record that no such disagreement actually existed, we ought not to consider the question, even though it may be certified in form.

Writ dismissed.

BAKER v. SELDEN.

1. A claim to the exclusive property in a peculiar system of book-keeping cannot, under the law of copyright, be maintained by the author of a treatise in which that system is exhibited and explained.
2. The difference between a copyright and letters-patent stated and illustrated.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Alphonso Taft and *Mr. H. P. Lloyd* for the appellant.

Mr. C. W. Moulton and *Mr. M. I. Southard* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Charles Selden, the testator of the complainant in this case, in the year 1859 took the requisite steps for obtaining the copy-

right of a book, entitled "Selden's Condensed Ledger, or Book-keeping Simplified," the object of which was to exhibit and explain a peculiar system of book-keeping. In 1860 and 1861, he took the copyright of several other books, containing additions to and improvements upon the said system. The bill of complaint was filed against the defendant, Baker, for an alleged infringement of these copyrights. The latter, in his answer, denied that Selden was the author or designer of the books, and denied the infringement charged, and contends on the argument that the matter alleged to be infringed is not a lawful subject of copyright.

The parties went into proofs, and the various books of the complainant, as well as those sold and used by the defendant, were exhibited before the examiner, and witnesses were examined on both sides. A decree was rendered for the complainant, and the defendant appealed.

The book or series of books of which the complainant claims the copyright consists of an introductory essay explaining the system of book-keeping referred to; to which are annexed certain forms or blanks, consisting of ruled lines, and headings, illustrating the system and showing how it is to be used and carried out in practice. This system effects the same results as book-keeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week, or a month, on a single page, or on two pages facing each other, in an account-book. The defendant uses a similar plan so far as results are concerned; but makes a different arrangement of the columns, and uses different headings. If the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement; but if it be assumed that the system is open to public use, it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. Where the truths of a science or the methods of an art are the common property of the whole world, and author has the right to express the one, or explain and use the other, in

his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account-books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system.

The evidence of the complainant is principally directed to the object of showing that Baker uses the same system as that which is explained and illustrated in Selden's books. It becomes important, therefore, to determine whether, in obtaining the copyright of his books, he secured the exclusive right to the use of the system or method of book-keeping which the said books are intended to illustrate and explain. It is contended that he has secured such exclusive right, because no one can use the system without using substantially the same ruled lines and headings which he has appended to his books in illustration of it. In other words, it is contended that the ruled lines and headings, given to illustrate the system, are a part of the book, and, as such, are secured by the copyright; and that no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright. And this is really the question to be decided in this case. Stated in another form, the question is, whether the exclusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system is explained? The complainant's bill, and the case made under it, are based on the hypothesis that it can be.

It cannot be pretended, and indeed it is not seriously urged, that the ruled lines of the complainant's account-book can be claimed under any special class of objects, other than books, named in the law of copyright existing in 1859. The law then in force was that of 1831, and specified only books, maps, charts, musical compositions, prints, and engravings. An account-book, consisting of ruled lines and blank columns, cannot be called by any of these names unless by that of a book.

There is no doubt that a work on the subject of book-keeping,

though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident, that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, — would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

The difference between the two things, letters-patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the

public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries.

The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book.

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that their form is their essence,

and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition, as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would undoubtedly be an infringement of the copyright.

Recurring to the case before us, we observe that Charles Selden, by his books, explained and described a peculiar system of book-keeping, and illustrated his method by means of ruled lines and blank columns, with proper headings on a page, or on successive pages. Now, whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book. Whether the art might or might not have been patented, is a question which is not before us. It was not patented, and is open and free to the use of the public. And, of course, in using the art, the ruled lines and headings of accounts must necessarily be used as incident to it.

The plausibility of the claim put forward by the complainant in this case arises from a confusion of ideas produced by the peculiar nature of the art described in the books which have been made the subject of copyright. In describing the art, the illustrations and diagrams employed happen to correspond more closely than usual with the actual work performed by the operator who uses the art. Those illustrations and diagrams consist of ruled lines and headings of accounts; and

it is similar ruled lines and headings of accounts which, in the application of the art, the book-keeper makes with his pen, or the stationer with his press; whilst in most other cases the diagrams and illustrations can only be represented in concrete forms of wood, metal, stone, or some other physical embodiment. But the principle is the same in all. The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.

The remarks of Mr. Justice Thompson in the Circuit Court in *Clayton* v. *Stone & Hall* (2 Paine, 392), in which copyright was claimed in a daily price-current, are apposite and instructive. He says: "In determining the true construction to be given to the act of Congress, it is proper to look at the Constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. 'Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.' The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term 'science' cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way: it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the act of Congress is, 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. . . . We are, accordingly, of opinion that the paper in question is not

a book the copyright to which can be secured under the act of Congress."

The case of *Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407) was a claim to copyright in a catalogue of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants, being dealers in the same business, published a similar book, and copied many of the plaintiff's drawings, though it was shown that they had for sale the articles represented thereby. The court held that these drawings were not subjects of copyright. Lord Romilly, M. R., said: "This is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale. If a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles for household furniture, or the most graceful species of decorations for articles of home furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs of each article he described, — such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement; provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser."

Another case, that of *Paye* v. *Wisden* (20 L. T. N. S. 435), which came before Vice-Chancellor Malins in 1869, has some resemblance to the present. There a copyright was claimed in a cricket scoring-sheet, and the Vice-Chancellor held that it was not a fit subject for copyright, partly because it was not new, but also because "to say that a particular

mode of ruling a book constituted an object for a copyright is absurd."

These cases, if not precisely in point, come near to the matter in hand, and, in our view, corroborate the general proposition which we have laid down.

In *Drury* v. *Ewing* (1 Bond, 540), which is much relied on by the complainant, a copyright was claimed in a chart of patterns for cutting dresses and basques for ladies, and coats, jackets, &c., for boys. It is obvious that such designs could only be printed and published for information, and not for use in themselves. Their practical use could only be exemplified in cloth on the tailor's board and under his shears; in other words, by the application of a mechanical operation to the cutting of cloth in certain patterns and forms. Surely the exclusive right to this practical use was not reserved to the publisher by his copyright of the chart. Without undertaking to say whether we should or should not concur in the decision in that case, we think it cannot control the present.

The conclusion to which we have come is, that blank account-books are not the subject of copyright; and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.

The decree of the Circuit Court must be reversed, and the cause remanded with instructions to dismiss the complainant's bill; and it is

So ordered.

MEGUIRE v. CORWINE.

A contract is contrary to public policy, and void, whereby, in consideration of A.'s procuring B.'s appointment as special counsel in certain causes against the United States, and aiding him in managing the defence of them, B. agrees that he will pay A. one-half of the fee which he may receive from the government.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Frederick P. Stanton for the plaintiff in error.

Mr. Enoch Totten for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The plaintiff in the court below is the plaintiff in error here.

The first count of the declaration avers that in consideration of the assistance to be rendered by him to the defendants' testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "Farragut prize cases," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defence in those cases, — which assistance was accordingly rendered, — the testator promised the plaintiff to pay him one-half of all fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases $29,950, of which sum the plaintiff was entitled to be paid one-half, &c.

The second count is substantially the same with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defence of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government.

The third is a common count alleging the indebtedness of the testator to the defendant for work and labor to the amount of $12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover. Lovel testified that "the testator also stated that

he had agreed to pay the plaintiff one-half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defence in said cases."

"On cross-examination, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the Treasury Department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one-half of the fees which he (Corwine) might receive from the United States for services in said cases.

"The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit — he thought some time last year — he met the testator (R. M. Corwine, deceased) in the Treasury Department, and had a conversation with him about the plaintiff and the Farragut cases. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one-half of his fees in the Farragut cases, and had paid him one-half the retainer received in 1869, and $4,000 in July, 1873, and had taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defence in the Farragut cases, and that he had agreed to pay to the plaintiff one-half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of

the Secretary of the Treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, Chief Quartermaster of the Department of the Gulf, during the war, and had possession of Holabird's papers, from which he derived the facts communicated to the testator for the defence of government in the prize suits in question. It was not controverted that the amount of fees received by the testator was $25,950, and that he paid over to the plaintiff $4,475 before the breach occurred between them. The further sum of $8,500 was claimed by the plaintiff, and this suit was brought to recover it. The learned counsel for plaintiff in error complains in his brief that "in the charge of the court, page 10, the jury were instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and a distinct contract;' 'and in the first instruction asked by the defendants and given by the court the jury were told that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.' . . . 'There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury were not allowed to infer, as they well might have done from the testimony of more than one of the witnesses, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business.'"

In our view of the record this is the turning-point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we have been unable to find any. The instructions expressly saved the right of the jury to find another and a different contract, and their atten-

tion was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnesses called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced, it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.

A judge has no right to submit a question where the state of the evidence forbids it. *Michigan Bank* v. *Eldred*, 9 Wall. 544. On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly. *Merchants' Bank* v. *State Bank*, 10 id. 604. The practice condemned in *Michigan Bank* v. *Eldred* is fraught with evil. It tends to create doubts which otherwise might not, and ought not to exist, and may confuse the minds of the jury and lead them to wrong conclusions. If the instructions here under consideration are liable to any criticism, it is that they were more favorable to the plaintiff in error than he had a right to claim.

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314; *Tool Company* v. *Norris*, 2 Wall. 45; *Trist* v. *Child*, 21 id. 441; *Coppell* v. *Hall*, 7 id. 542. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of

those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In *Trist* v. *Child* (*supra*), while recognizing the validity of an honest claim for services honestly rendered, this court said: "But they are blended and confused with those which are forbidden: the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases *potior conditio defendentis*. Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. *Barth* v. *Clise, Sheriff*, 12 Wall. 400.

Judgment affirmed.

MARKET COMPANY *v.* HOFFMAN.

1. Pursuant to the authority conferred by its charter, granted by an act of Congress approved May 20, 1870 (16 Stat. 124), the Washington Market Company offered to the highest bidder at public auction the stalls in the market for a specific term, subject to the payment of a stipulated annual rent. At the expiration of that term, A., one of such bidders, filed his bill to enjoin the company from selling the stall leased to him, claiming that he had the right to occupy it as long as he chose in carrying on his business as a butcher, provided that he thereafter paid the rent as it from time to time should become due. *Held*, that A.'s right of occupancy ceased with the term, and that the company had the right to offer the stall for sale to the highest bidder.
2. Where a number of bidders filed such a bill, the value of the right to sell, which the company claimed and the court below denied, determines the jurisdiction here. Where, therefore, a sale which would have produced more than $2,500 was enjoined by the Supreme Court of the District of Columbia, the company is entitled to an appeal, under the act of Feb. 25, 1879. 20 Stat. 320.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. William Birney for the appellant.
Mr. Richard T. Merrick for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

This was a bill originally brought by James A. Hoffman against the Washington Market Company, praying for an injunction against the company's proceeding to sell a stall in their market, occupied by him, and for a decree establishing his right to retain possession of said stall so long as he chose to occupy it for his business as a butcher. Subsequently the bill was amended by consent, and two hundred and five occupants of other stalls in the market were made complainants with him. The relief then asked was an injunction in favor of each complainant, together with a decree establishing the right of each to the continued occupancy of his stall so long as he might choose to occupy it for his business. After hearing, the court by a final decree enjoined the company from selling, or offering for sale, the stands and stalls of the several complainants, or any of them, and also adjudged that the rights of the complainants in their several stalls and stands did not expire, by any valid limitations of the time for the continuance of such rights and interest, in two years from July 1, 1872. From this decree the company appealed.

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000. Of

this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction.

Dismissing this, we come directly to the merits of the case. The company, chartered by an act of Congress approved May 20, 1870 (16 Stat. 124), was authorized to erect upon a lot belonging to the United States a market-house with stalls. By the second section of the act it was enacted as follows: —

"And the said company shall, whenever any part or parts of said buildings, stalls, stands, and so forth, for market purposes, are ready for use or occupancy, offer the same for sale at public auction, for one or more years, to the highest bidder or bidders, subject to the payment of an annual rent, the amount of which to be fixed by the mayor and common council of the city of Washington and the directors of this incorporation" [a prescribed public notice being given], "and all subsequent sales and leases thereof shall be made on similar notice and in the same manner. . . . The stalls, stands, and privileges of all kinds, in said market, to be used for market purposes, when offered at public sale, shall be let to the highest bidder, and there shall be no bidding on the part of said company, directly or indirectly; but said company, with the consent of the mayor and aldermen of the city of Washington, may fix a minimum rate of bids at such sale; and the person who shall offer the highest price, at or beyond such minimum, for any such stand, stall, or privilege, shall be entitled to the occupation thereof, and shall be considered as having the good-will and the right to retain the possession thereof so long as he chooses to occupy the same for his own business and pay the rent therefor. . . . *Provided, however*, that such right to the possession of such stands or stalls may be sold and transferred by such purchaser under regulations to be fixed by the by-laws of said company, and, in the case of the death of such purchaser during the existence of his lease, it shall be disposed of as other personal property."

By sect. 14, the corporation was required to pay to the city of Washington the sum of $25,000 annually, in consideration of the privileges granted; and by sect. 12 it was provided that at the expiration of thirty years the city of Washington might take possession of the property, on paying a sum equal to a fair valuation of the buildings and improvements. The property was made to revert to the United States at the end of ninety-nine years.

Such were the provisions of the act of Congress that have any bearing on the present case. In pursuance of the authority given by the second section, the company, on the 25th of May, 1872, offered to the highest bidder, at public auction, the stalls or stands in the market, for the term of two years from the first day of July, 1872; and Hoffman, with the other complainants, or persons under whose bids they claim, became the highest bidders for the several stalls they occupy. They now insist that they are entitled to hold the stalls thus bid off so long as they may choose to occupy them for their own business and pay the rent, notwithstanding the said term of two years has expired, claiming that such are the rights given by the act of Congress to the highest bidders at the auction.

We think this claim is quite unfounded. In our judgment, it has no warrant in any reasonable construction of the charter. The company was authorized and required to sell the privilege of occupying a stall at public auction *for a term*, or, to use the language of the act, "for one or more years;" and subsequent sales and leases were required to be made in the same manner. The company was left at liberty to fix the length of the term. They might sell for two years, or ten, or thirty, at their option, but in all cases sales were required to be made for a definite period. No authority was given to create a tenancy at will, — a tenancy at the will of either the company or the bidder at the sale. The prescription to sell "for one or more years" negatives this. Had it been intended that the sale should confer upon the highest bidder the right to occupy a stall at his will, and so long as he might use it for his business, those words would not have been inserted in the statute. They would be unmeaning; even more, they would have been contradictory of the intent. It would have been sufficient to declare that the stalls should be sold at public auction, and that the highest bidder should have the right to hold so long as he chose to occupy for his business and pay rent. We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that,

if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

Keeping these admitted rules of construction in view, the clause in the charter which defines the rights of purchasers at the sale, the clause upon which the complainants rely, is easily understood. It declares in effect that the highest bidder for a stall shall be considered as having the good-will, and the right to retain possession thereof during his term, so long as he chooses to occupy the same for his own business and pay the rent therefor. The construction contended for by the complainants is obviously inconsistent with the direction that sales of rights of occupancy should be made for a term; that is, for one or more years. That construction, therefore, is not to be admitted, if another reasonable one can be given. That the clause (general as its language is) has some limitation will not be questioned. It will not be claimed that it gives to the highest bidder at a sale for two years, or to his vendee or transferee (for such bidder is authorized to assign), a perpetual right of occupany so long as he pays the rent. If it does, the right may outlast the time when by the charter the corporation of Washington is empowered to take possession of the market buildings and grounds, and even the time when the company's rights and property are to revert to the United States. To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In *Brewer's Lessee* v. *Blougher* (14 Pet. 78), it was said to be the undoubted duty of the court to ascertain the meaning of the legislature from words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it. Now, the subject upon which Congress attempted by this clause to legislate was the rights of the highest bidder for a stall, under a purchase for a term of years,

and not the rights of a purchaser under a bid for an indefinite period, terminable only at his will. Nothing else was in view of the legislature. No other sale had been spoken of. The enactment, therefore, that he should have the good-will and possession of the stall so long as he might choose to occupy it, paying rent, must have reference to possession during the term, for that was the only subject under consideration. Such a construction of the clause gives effect to it, denies effect to no other words or provisions in the statute, and is in strict harmony with every part. It is the only construction that harmonizes all the provisions of the act. And it is a construction which in a very important particular is beneficial to the highest bidders at the sale. The clause not only declares that the highest bidder above a fixed minimum shall by his bid become entitled to the possession, which had not been declared previously in the act, but it impliedly relieves him from what might, without it, have proved an onerous burden. The stalls in this case were sold for two years. The market company might have sold them for twenty, or even thirty. Such authority was given by the statute. Had they done so, the purchaser of a stall would have been bound to pay the stall-rent during the whole period, of twenty or thirty years, whether he occupied the stall or not, were it not for this provision, and in case of his death his estate would have been liable. To guard against this, his right under his bid to retain the occupany is declared to continue so long as he chooses to occupy for his own business, and pay the rent, clearly implying that when, during the period for which he bought, he chooses to give up the occupancy and cease to pay the rent, his liability ceases. In other words, the company is bound to permit his occupancy during the term which was sold, but the bidder is not bound absolutely to pay rent during the whole term, nor longer than he chooses to occupy the stall for his own business.

To our minds, therefore, it appears clearly that, under the true and reasonable construction of the act of Congress, the complainants below acquired by the bids made at the auction sale in 1872 no right to more than two years' occupancy of their several stalls, and no right to continue in possession

thereof after July 1, 1874. Our conclusion is supported by several other considerations. In the second section of the act it is enacted that in case of the death of any purchaser at the auction sale, "during the continuance of his lease," his right to the possession of his stall should be sold as other personal property. The words, "during the continuance of his lease," indicate strongly that Congress contemplated and intended that what was sold at the auction should be a term of years, with fixed limits of duration. Else why speak of the existence of a lease and its continuance?

We may add that the contemporaneous understanding of the parties was in harmony with the construction of the statute we now give. On the twenty-third day of May, 1872, the company resolved to commence the sale of rights to occupy the stalls on the twenty-fifth day of that month, in pursuance of previous notice given; and resolved also that the sales should be of the right to occupy for two years from July 1, 1872. On the same day, May 23, 1872, the company adopted market regulations, as they were authorized to do by their charter. Among these regulations were the following: Rent shall be payable quarterly in advance. No person shall be allowed to occupy a stall, or stand, until he has signed the market regulations, and has received a permit describing the character of his stall or stand, and the conditions of occupancy. At the end of the term of each occupant he shall quit and deliver up his stand peaceably, in as good order and condition, except ordinary wear, as the same now is, or may be put into by the company. With such regulations in force the sales were made, and a permit was delivered to each purchaser, declaring him entitled to occupy his stall "for the term of two years from July 1, 1872, paying therefor the quarterly rent in advance, subject to the conditions of the charter and by-laws of the company and the regulations of the company; the permit to be of no effect until the holder had signed the regulations." Thus the claimants, or those under whom they claimed, obtained possession, and thus they engaged to surrender possession at the expiration of their term of two years. It does not appear to have entered into the contemplation of the company, or the bidders at the sale, at that time, that by the purchase a bidder obtained a possible right

of occupancy for more than two years. The construction now insisted upon by the complainants is an afterthought, a creature of recent birth.

In view of the considerations thus presented, we are of opinion that the Supreme Court of the District erred in construing the charter of the company, and sustaining the complainants' bill. Of the cross-bill it is sufficient to say that it must fall with the bill of the complainants. This is conceded by the appellants.

The decree of the Supreme Court of the District will be reversed with costs, and the record remitted, with instructions to dismiss both the bill and the cross-bill; and it is

So ordered.

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE HARLAN, dissenting.

I dissent from the judgment of the court in this case. I think that it was the intent of the statute to give to the purchasers of stalls the benefit of the "good-will" acquired during the term, so long as they chose to keep them and pay the rents originally fixed, or which might from time to time be imposed by the common council.

ROBERTS v. BOLLES.

1. By the statutes of Illinois, municipal bonds payable to bearer are transferable by delivery, and the holder thereof can sue thereon in his own name.
2. The statute of that State of March 6, 1867, provides that the supervisor of a town, if a majority of the legal voters thereof voting at an election to be held for the purpose so authorized, shall subscribe for stock of a railroad company in the name of the town, and issue its bonds in payment therefor, and the fifth section declares that "no mistake in the giving of notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the bonds so issued, *provided* that there is a majority of the votes at such election in favor of such subscription." An application in due form for an election was signed by only twelve legal voters and taxpayers instead of twenty, and ten days' notice of the election instead of twenty given. The election was held at the specified time, and a majority

of the electors of the town voting thereat favored the subscription. It was accordingly made. An act of the legislature legalized the subscription, and the bonds were issued. *Held*, that, independently of that act, the bonds are not, in the hands of a *bona fide* purchaser, rendered invalid by reason of the departure from the statutory provisions touching the application for, and the notice of, the election.

3. *Williams* v. *Town of Roberts* (88 Ill. 1), decided three years after the judgment now under review was rendered, is not accepted by this court as conclusive against the validity of the bonds; for the Supreme Court of Illinois, while holding the election to be void, does not refer to said sect. 5, nor to the precise question upon which their validity is sustained here.
4. That decision would be an authority in point if it declared that said sect. 5 is in conflict with the Constitution of the State, or that the defects in the application and notice are not mere mistakes, within the meaning of the said statute of March 6, 1867. *Sed quære*, would it be conclusive here.
5. *Brooklyn* v. *Insurance Company* (99 U. S. 362) cited and approved.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action brought by Bolles & Co. against the town of Roberts on certain bonds and coupons issued in its name by the supervisor of the town, in payment of its subscription to the capital stock of the Hamilton, Lacon, and Eastern Railroad Company. A judgment was rendered against the town, and the case was removed here on error. The facts are fully stated in the opinion of the court.

Mr. A. J. Bell for the plaintiff in error.

Mr. George O. Ide, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the validity of certain township bonds, bearing date April 7, 1871, issued in the name of the town of Roberts, in the county of Marshall, Ill., and made payable to the Hamilton, Lacon, and Eastern Railroad Company, *or bearer*, on the 7th of April, 1874, with interest from date, payable annually, on the presentation and surrender of the interest coupons as they matured.

Each bond, signed by the supervisor of the town, attested by its clerk, and certified upon its face to have been duly recorded in the township registry of bonds, as directed by law, recites that it "is one of a series, amounting in the aggregate to $50,000, and consisting of thirty bonds, numbered from 1 to

80, inclusive, each of which is for $1,000, and all of which are of even date herewith, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon, and Eastern Railroad Company, which said subscription was made by said town by virtue of a vote of a majority of the voters of said town in favor thereof, at a special election had for such purpose in said town on the twenty-fifth day of March, 1869, in pursuance of the provisions of the laws of the State of Illinois, and of the several acts of the General Assembly of the State of Illinois incorporating said company."

It is found as a fact in the case that, in January, 1872, defendants in error purchased, in good faith, the bonds in the market, without notice of any defence thereto, and paying therefor at the rate of ninty-three and a half cents on the dollar.

The first plea alleges that the payee named in the bonds, the railroad company, had never indorsed them, or any of them, in writing, and that by the law of Illinois in force when they were made, as well as when they were sold by the company, without such indorsement, they were not transferable so as to vest the title thereto, and the right to sue thereon in the name of the holder.

A demurrer to that plea was sustained, and, as we think, properly so. It is true that the Supreme Court of Illinois, in *Hilborne* v. *Actus* (4 Ill. 344), held that under a statute of that State, then in force, notes payable to a person or bearer could not be transferred, or assigned by delivery only, so as to authorize the holder by delivery to sue in his own name. "There is one way," the court said, "by which he can do so, and that is by virtue of the assignment indorsed on the note itself. The indorsement gives the right to sue in the name of the assignee." That construction of the Illinois statute was followed in *Roosa* v. *Crist*, 17 id. 450. But *New Hope Delaware Bridge Co.* v. *Perry* (11 id. 467) decides that bank-notes payable to bearer, or to a particular person or bearer, are not embraced by the provisions of the statute, or by the reasons which caused its passage; and that the holder, by delivery merely, can maintain an action thereon, unless it appears that he obtained them

mala fide. The statute, it was said, applies "only to instruments that were not negotiable by the common law or the custom of merchants."

In *Johnson* v. *County of Stark* (24 id. 75), the court put municipal bonds and coupons on the footing, in this respect, of bank-bills, and thus brought that class of commercial securities within the rule announced in *New Hope Delaware Bridge Co.* v. *Perry*. Its language was: "It seems to be the well-settled doctrine that State, county, city, and other bonds and public securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank-bills, especially when they are payable to bearer." Subsequently, in *Supervisors of Mercer County* v. *Hubbard* (45 id. 139), which was an action on coupons attached to bonds issued by a county in payment of a railroad subscription, the court said: "More recent decisions place these coupons in the condition of bank-bills payable to bearer, and no one will deny such bills can be given in evidence in a suit by the bearer against the bank issuing them, under the common counts. We see no difference between coupons payable to bearer for a sum certain, and a bank-bill. They alike pass by delivery only." Finally, in *Town of Eagle* v. *Kohn* (84 id. 292), it was said: "It is the well-settled doctrine that bonds of this character are to be treated as commercial paper; and this court has held coupons attached to them to be negotiable by delivery only, without indorsement."

It is thus seen that by repeated adjudications of that court, prior to the statute of 1874, municipal bonds payable to bearer were excepted from the rule announced in *Hilborne* v. *Actus* and *Roosa* v. *Crist*.

But all doubt upon the subject is removed by the eighth section of the act approved March 18, 1874, revising the laws of Illinois in relation to promissory notes, bonds, due-bills, and other instruments of writing, which was in force when this action was commenced. It provides "that any note, bond, bill, or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof." Rev. Stat. Ill. 719, sect. 8.

This act, though not in force when defendants in error

acquired the bonds in suit, applies, we think, to actions commenced after it took effect.

We are satisfied that this plea, tested alone by the law of Illinois, and without reference to the decisions of this court upon the subject of commercial securities, is insufficient.

The third plea, to which a demurrer was also sustained, proceeds upon the ground that the election of March 25, 1869, was called without competent authority, and conferred no power upon the supervisor and town clerk, or either of them, to subscribe to the stock or issue the bonds in question, and that the latter were, consequently, void.

Of the facts set out in the plea it is alleged that the defendants in error had "constructive notice," prior to their purchase of the bonds; to wit, on the day they bear date.

The questions of law presented under this plea arise out of certain facts which it is necessary to state somewhat in detail.

By an act of the legislature of Illinois, approved March 5, 1869, it is provided that any incorporated town or township of any county through or near which the Hamilton, Lacon, and Eastern Railroad Company may be located, or is about to be located, might, by a vote of the people thereof, subscribe to the corporate stock of the company any sum not to exceed $100,000 each, — such vote to be ascertained by an election held in the manner prescribed by and in conformity with the provisions of an act, approved March 6, 1867, authorizing certain designated counties, and townships, cities, incorporated towns, and corporations in said counties, to subscribe to the capital stock of any railroad then or which might thereafter be incorporated in the State of Illinois. The act of March 5, 1869, made it the duty of the clerk of each township, subscribing stock under its authority, to keep, in duplicate, a complete register of the bonds issued, showing their numbers, amount, date, and rate of interest, and deliver one copy of the same to the county clerk of his county.

Under the act of March 6, 1867, to which reference is made by the act of March 5, 1869, elections, to take the sense of the people upon subscriptions to the capital stock of a railroad company, could be called and held, upon the application of

twenty legal voters and tax-payers of the county, township, city, or incorporated town in whose behalf it was proposed to make the subscription, such application specifying the amount and the conditions of the proposed subscription. The notice of such election was required to be posted, in the case of a township, by the clerk thereof, in three of the most public places of such township. If a majority of such voters voting at said township election favored the subscription, then it was made the duty of the supervisors thereof to make the subscription; and when the subscription was accepted or received, to cause the bonds to be issued in compliance with the popular vote. Pri. Laws Ill. 1867, vol. i. p. 866.

The fifth section of the act of March 6, 1867, declares that "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued: *Provided*, that there is a majority of the voters at such election in favor of such subscription."

A few weeks after the election of March 25, 1869, to wit, on 17th April, 1869, the legislature of Illinois passed an act which, in its second section, declares that subscriptions of stock made by certain townships, including that made by the town of Roberts of $30,000 to the capital stock of the Hamilton, Lacon, and Eastern Railroad Company (quoting from the act), "be each legalized, and are hereby made valid and binding, according to the terms thereof; and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for, according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company." Pri. Laws Ill. 1869, vol. iii. p. 302.

With these facts before us, we come to the examination of several propositions which have been pressed with much force upon our attention.

It is contended that the election mentioned in the bonds declared on was a nullity, because called upon an application signed by only twelve, instead of twenty, legal voters and tax-payers, and because only ten days' notice thereof was given, when the law required twenty; that the law is imperative in

these respects, and that the failure to comply with its requirements rendered the bonds void, even in the hands of innocent holders for value; that such was the settled law of Illinois, as declared by the Supreme Court of that State prior both to the election of March 25, 1869, and to the issuing of the bonds; and, finally, that such prior judicial declarations are to be regarded as part of the local statutes, binding upon this court, according to its own decisions.

Undoubtedly there are several decisions by the Supreme Court of Illinois of the character indicated by counsel; but unless we are greatly in fault in our examination, no one of them relates to a municipal subscription, or to an issue of bonds, under a statute containing a provision similar to sect. 5 of the act of March 6, 1867, under which the election in question was held. That act rests the validity of bonds issued under its authority upon the essential fact that the majority of voters at the election voted, as in this case, in favor of the subscription. In that event, it expressly declares that the bonds shall not *in any way* become invalidated by reason of *mistake in the giving of the notice, or in the canvass or return of votes, or the issuing of the bonds.* These words are without effect if the municipality issuing the bonds can avoid their payment because its agents or constituted authorities committed mistakes such as are specified in the statute. If the town clerk gave a notice of ten instead of twenty days, based upon an application of twelve instead of twenty legal voters and tax-payers, was not this a mistake "in the giving of the notice" and "in the issuing of the bonds"? The purchaser of the bonds, if chargeable with notice of these facts, was, in terms, assured by the statute that no such mistakes as those facts indicated would invalidate the bonds, if the majority of the voters at the election had approved the subscription. He had the right to rely upon these legislative assurances, unless the fifth section of the act of March 6, 1867, was in violation of the Constitution of the State. We do not, however, feel justified in declaring that provision of the act to be in conflict with that instrument. We are referred to no decision of the State court which so decides. On the contrary, that court, in *Burr* v. *City of Carbondale* (76 Ill. 455), which was a case of municipal bonds, said:

"These bonds having been issued in the exercise of a power constitutionally conferred, must be binding on the municipality, although some irregularities in the form of notice of the election, want of the precise words on the ballots, and others of like character, may have occurred." p. 469.

It is true that, according to the settled construction of the Constitution of Illinois in force in 1869, the legislature could not require or compel the corporate authorities of a county, city, or town, against or without its consent, to subscribe to the stock of a railroad company. But it could *authorize* such corporate authorities to make subscriptions with or without referring the question to the people immediately interested.

In *President and Trustees of the Town of Keithsburg* v. *Frick* (34 Ill. 405), the Supreme Court of Illinois, speaking by the late Chief Justice Breese, held that it was by no means a necessary element in municipal subscriptions to the stock of railroad corporations that there should be a vote of the inhabitants of the town or city authorizing them; "that it was competent for the legislature to bestow the power directly on the corporation without any other intermediary." The authority of that case, upon some points therein determined, has perhaps been shaken by later decisions in the same court. But in *Marshall* v. *Silliman* (61 id. 218), the court, while holding that the legislature could not clothe the supervisor and town clerk, without the consent of the people, with discretionary power of taxation or of creating a debt, — they not being the corporate authorities of the township in the sense of the Constitution, — yet approved that case so far as it ruled that those who were the corporate authorities of a town, within the meaning of a State Constitution, might be empowered by the legislature to subscribe to the stock of a railroad corporation, and issue bonds therefor, without taking a vote of the people. *Q. M. & P. R. R. Co.* v. *Morris*, 84 id. 410.

Certainly the legislature could prescribe the mode of ascertaining the sense of the voters, who alone, it is claimed, were the corporate authorities of the town, within the meaning of the State Constitution. And as it might, in the act of March 6, 1867, have allowed the election to be called upon the application of a less number of voters and tax-payers than twenty,

and to be held after a notice of ten days, rather than twenty, we do not see any ground to question its right, consistently with the State Constitution, to declare, in advance, that if the majority of voters at the election favor the subscription, the bonds issued in payment thereof should not be invalidated by mistakes of the kind specified in the fifth section of that act. The mistakes here complained of were not such as necessarily affected the substance or essence of the election, and consequently it cannot be said that the subscription was made or the bonds issued without the consent of the corporate authorities or the legal voters of the township. The application for the special election and the notice therefor were not so radically defective as to justify us in saying, as matter of law, that a debt for a railroad subscription was thrust upon the legal voters and tax-payers of the township without their having a reasonable opportunity to vote upon the question of subscription. It is not a case where bonds have been issued by the supervisor and town clerk, without any previous election whatever to authorize them so to do. It is a case of bonds issued in pursuance of a popular election, defectively called and held, and as to which the legislature declared that the bonds should not be invalidated by mistakes in giving the notice and in issuing them, if there was "a majority of votes at such election in favor of such subscription."

In this respect the case in hand is different from *Township of Elmwood* v. *Marcy*, 92 U. S. 289. In the latter case, when the notice for the election was given, there was no provision in the charter of the town or in any statute of the State which authorized the subscription. The power of the town to subscribe had previously been exhausted; and the notice was not under or with special reference to the subsequent act allowing an additional subscription. Nothing here determined conflicts with that decision.

Independently, therefore, of the curative act of April 17, 1869, we are of opinion that the bonds sued on are not invalid by reason of the departure from the provisions of the act of March 6, 1867, in the matter of the application for and notice of the election of March 25, 1869.

But a further contention of the plaintiff in error is that the

Supreme Court of Illinois, in *Williams* v. *Town of Roberts* (88 Ill. 1), decided in June, 1878, nearly four years after the commencement of this action, and three years after the entry of the judgment in this case, held not only that the curative act of April 17, 1869, was in violation of the Constitution of the State, but that the election of March 25, 1869, was a nullity, conferring no power upon the supervisor of the town to make the subscription and issue the bonds.

In reference to the alleged conflict of the last-named act with the Constitution of Illinois, we give no opinion. The views we have expressed as to the validity of the bonds, under the act of March 6, 1867, particularly its fifth section, render it unnecessary to consider or determine the constitutional validity of the curative act of 1869. It is, however, claimed that we are obliged to accept the decision in *Williams* v. *Town of Roberts*, as conclusive against the validity of these particular bonds. We cannot give our assent to this proposition, for the reason, if there were no other, that that decision does not touch the precise point upon which we sustain their validity, despite the defective application and notice for the election of March 25, 1869. No reference is made, in that case, to the fifth section of the act of March 6, 1867, upon which we have commented. The Supreme Court of Illinois, in the case alluded to, undoubtedly held that the defects in the application and notice rendered that election a nullity, and that, because of such defects, the subscription was made and the bonds issued without authority of law. But we are not informed as to the effect which, in the opinion of that court, is to be given to the fifth section of the act of March 6, 1867. If the court had gone further, and decided that section to be unconstitutional; or that the defective application and notice for the election were not mere mistakes within the meaning of that section; or that the bonds declared on were null and void, notwithstanding the legislative declaration that they should not be invalidated because of any mistake in giving the notice, in issuing the bonds, or in the canvass or return of votes, — then its decision would have been an authority in point, covering the precise question before us. If we are mistaken in this, it does not follow that we should accept that decision as conclusive of this case. That would depend

upon our approval or disapproval of the decision upon its merits. In *Pease* v. *Peek* (18 How. 599), we said that this court would not feel bound, "in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the mean time. Such decisions have not the character of established precedent declarative of the settled law of the State." *Morgan* v. *Curtenius*, 20 How. 1.

For these reasons we are of opinion that the demurrer to the third plea was properly sustained.

The facts set out in the fourth plea clearly do not constitute a defence to the action. We could not hold otherwise without overturning the settled doctrines of this court in reference to municipal bonds issued in payment of subscriptions to the capital stock of railroad corporations. Our remarks in *Brooklyn* v. *Insurance Company* (99 U. S. 362) are applicable to this case, and support the action of the court in sustaining a demurrer to the fourth plea.

Other considerations might be suggested in support of the judgment, but what we have said is sufficient to dispose of the case.

Judgment affirmed.

NATIONAL BANK v. COUNTY OF YANKTON.

1. The statute of Congress organizing a Territory within the jurisdiction of the United States is the fundamental law of such Territory, and as such binding upon the territorial authorities.
2. Subject to the limitations expressly or by implication imposed by the Constitution, Congress has full and complete authority over a Territory, and may directly legislate for the government thereof. It may declare a valid enactment of the territorial legislature void or a void enactment valid, although it reserved in the organic act no such power.
3. Under the statutes of Congress (12 Stat. 239 and 15 id. 300) the legislative assembly of Dakota meets biennially, and no one session thereof can exceed forty days. That assembly met Dec. 5, 1870, and after continuing in session every day, Sundays excepted, until Jan. 13, 1871, adjourned without day. The acting governor convened it April 5, 1871, when, after organizing, it passed, among other laws, one entitled "An Act to enable organized

counties and townships to vote aid to any railroad, and to provide for payment of the same." In strict conformity to its provisions, the electors of a county voted to donate a specific sum to a certain railroad company. Congress, by an act approved May 27, 1872 (17 id. 162), disapproved and annulled said territorial act, but provided that the vote of aid for the construction of the main stem of the road of the company should not be impaired, and that the company was a valid corporation. The company complied with the requirements of Congress by giving for the aid so voted an equal amount of stock to the county, and the latter issued its bonds therefor. In an action brought by a *bona fide* holder of them to recover certain instalments of interest, — *Held*, that, independently of the question of authority to convene that extra session, or of the validity of the laws enacted thereat, the bonds are binding on the county, inasmuch as the act of Congress is equivalent to a direct grant of power to issue them.

ERROR to the Supreme Court of Dakota Territory.

The facts are stated in the opinion of the court.

Mr. S. W. Packard and *Mr. James Grant* for the plaintiff in error.

Mr. Matt. H. Carpenter and *Mr. James Coleman* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

By sect. 4 of the act to provide a temporary government for the Territory of Dakota, no one session of the legislative assembly shall exceed forty days (12 Stat. 239), and in 1869 Congress declared that the sessions of all territorial legislative assemblies should be biennial. 15 id. 300. The members of the legislative assembly of Dakota met on the 5th of December, 1870, and continued in regular session on all days, except Sundays, until Jan. 13, 1871, when they adjourned without day. The day of adjournment was called on the journals the fortieth day of the session, although there had been but thirty-five days of actual session for the transaction of business. On the 18th of April, 1871, the members of the legislature elected the preceding fall again assembled at the call of the acting governor of the Territory. After organizing themselves as a legislative assembly and proceeding to legislate for the Territory, they passed, among other acts, one entitled "An Act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same." Under this act

the voters of Yankton County, on the 2d of September, 1871, voted to donate the Dakota Southern Railroad Company $200,000 in the bonds of the county. All the proceedings under which this vote was taken were conducted strictly according to the requirements of the law.

On the twenty-seventh day of May, 1872, the following act of Congress was approved and went into effect. 17 id. 162.

"*An Act in Relation to the Dakota Southern Railroad Company.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the act passed by the legislative assembly of the Territory of Dakota, and approved by the governor on the twenty-first day of April, 1871, entitled 'An Act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same' be, and the same is hereby, disapproved and annulled, except in so far as herein otherwise provided. But the passage of this act shall not invalidate or impair the organization of the company heretofore organized for the construction of the Dakota Southern Railroad leading from Sioux City, Iowa, by way of Yankton, the capital of said Territory, to the west line of Bon Homme County, or any vote that has been or may be given by the counties of Union, Clay, Yankton, and Bon Homme, or any township granting aid to said railroad, or any subscription thereto, or any thing authorized by and that may have been done in pursuance of the provisions of the aforesaid act of the legislative assembly of said Territory towards the construction and completion of said railroad, and the said Dakota Southern Railroad Company, as organized under and in conformity to the acts of the legislative assembly of said Territory, is hereby recognized and declared to be a legal and valid corporation; and the provisions of the act of the legislative assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company for the construction, completion, and equipment of the main stem of said railroad, between the termini aforesaid, are hereby declared to be and remain in full force, but no further, and for no other purpose whatsoever.

"SECT. 2. That for the purpose of enabling the said Dakota Southern Railroad Company to construct its said road through the public lands between the termini aforesaid, the right of way through said public lands is hereby granted to said company to the extent

of one hundred feet in width on each side of said road: *Provided*, that nothing in this act shall relieve said Dakota Southern Railroad Company from constructing and completing said railroad in accordance with the conditions and stipulations under which the citizens of the counties therein named voted aid to said railroad in accordance with the laws of said Territory, approved April 21, 1871: *Provided further*, that said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships."

After the passage of this act, the bonds voted were delivered by the county commissioners to the railroad company, and stock in the company for an equal amount was issued to the county. The First National Bank of Brunswick, Maine, the *bona fide* holder and owner of ten of these bonds, amounting in the aggregate to $10,000, brought this suit against the county to recover three instalments of interest. The defence was that there was no law authorizing the issue of the bonds, and, as a consequence, that the county was not bound for the payment of either principal or interest. Upon the trial of the cause, the facts were found substantially as already stated, and a judgment was rendered by the District Court of the Territory in favor of the county. This judgment was afterwards affirmed by the Supreme Court, and thereupon the bank brought the case here by writ of error.

We do not consider it necessary to decide whether the governor of Dakota had authority to call an extra session of the legislative assembly, nor whether a law passed at such a session or after the limited term of forty days had expired would be valid, because, as we think, the act of May 27, 1872, is equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute. It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Con-

stitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

Turning, then, to the particular act of Congress now under consideration, we find that the attention of that body was in some way brought to the fact that the legislative assembly of Dakota had, on the 21st of April, 1871, passed an act to enable organized counties and townships to vote aid to railroads. In addition to this, it was known that the Dakota Southern Railroad Company had been organized as a corporation under certain acts of the territorial legislative assembly, and that votes had been taken under the aid act in some of the counties and

townships granting aid to or authorizing subscriptions of stock in this corporation. It is clear that Congress disapproved the policy of the aid act, and was unwilling to have it go into general operation; but to the extent it could be made available for the construction and completion of the main stem of the Dakota Southern Railroad the contrary is distinctly manifested. The act as a whole was "disapproved and annulled," but in substance re-enacted by Congress "for the purpose of validating any vote of aid or subscription" to that company, but "for no other purpose whatever." A careful examination of the statute leaves no doubt in our minds on this subject. To make it sure that the organization of the company was complete, the "Dakota Southern Railroad Company, as organized under and in conformity to the acts of the legislative assembly of said Territory," was "recognized and declared to be a legal and valid corporation." It is then in terms enacted that the provisions of the aid act, "so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company, for the construction, completion, and equipment of the main stem of said railroad, . . . are hereby declared to be and remain in full force." And again: "that said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad, paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships." In the light of these distinct and positive declarations and enactments of Congress, it is impossible to bring our minds to any other conclusion than that, when the bonds now in controversy were put out, there existed full and complete legislative authority to bind the people of the county for their payment. No complaint is made of any irregularity in the proceedings under the law. The question in the case is one of power only. As we think, the vote of the people of the county was "validated" by Congress, and express authority given to issue the bonds for the purposes originally intended. The only change which Congress saw fit to make was to require the company to give stock in return for the donation as voted.

The judgment of the Supreme Court of the Territory will be reversed, and the cause remanded with instructions to reverse

the judgment of the District Court and direct a judgment for the plaintiff on the facts found for such amount as shall appear to be due on the coupons sued for; and it is

So ordered.

WOOD v. CARPENTER.

The statutes of Indiana provide that "an action for relief against frauds shall be commenced within six years," and that "if any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." A., who had recovered judgment in 1860 in a court of that State against B., brought suit in 1872, alleging that the latter, in 1858, in order to defraud his creditors, confessed judgments, incumbered his property, and in 1862 transferred his real and personal estate to sundry persons, who held the same in secret trust for him; that on being arrested in 1862, upon final process to compel the payment of A.'s judgment, he deposed that he was not worth twenty dollars, and had in good faith assigned all his property to pay his creditors; that A. believing the statement, and relying upon the representations of B., that C., his son-in-law, would with his own means purchase the judgment for fifty cents of the principal and interest, sold it in 1864 to C.; that he has since discovered that the money he received therefor belonged to B.; that the latter has now an indefeasible title to the property; and that said judgment has been entered satisfied. *Held*, that the Statute of Limitations commenced running when the alleged fraud was perpetrated, and that it is not avoided by a replication averring that B. fraudulently concealed the facts in the declaration mentioned, touching the incumbering or the conveying of the property, the confession of judgments, and his real ownership of the property, and that A. had no knowledge of them until a short time before the suit was brought.

ERROR to the Circuit Court of the United States for the District of Indiana.

The facts are stated in the opinion of the court.

Mr. Andrew L. Robinson and *Mr. Asa Iglehart* for the plaintiff in error.

Mr. Charles Denby and *Mr. J. M. Shackelford* for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This action was brought Oct. 21, 1872. The amended complaint or declaration makes the following case: William L.

Wood, the plaintiff, recovered judgments in the Vanderburg Circuit Court against Willard Carpenter upon sundry promissory notes and bills of exchange. The first judgment bore date on the 16th of May, 1860, and the last on the 22d of August in that year. In the aggregate they amounted to the sum of $8,557.07. At the dates of the notes and bills the defendant was the owner of real and personal estate of the value of $500,000. For the purpose of defrauding the plaintiff and others by depreciating the value of their claims against him, and of thereby inducing them to sell the claims to him for less than their face, the defendant, in the year 1858, entered into a fraudulent conspiracy with his brother, Alvin B. Carpenter, and others to the plaintiff unknown, to incumber his real estate and hide away the title so that the property should not be sold to pay his debts, but in the end inure to his benefit. In pursuance of this scheme he confessed sundry fraudulent judgments for large sums, and afterwards made a fraudulent assignment of all his property to William H. Walker and William D. Allis, and thereafter procured the title to all his real and personal estate to be vested in his brother, Alvin, and others, who held the property in secret trust for the defendant. In this way the title was so concealed that the plaintiff was prevented from levying executions issued upon his judgments. On the 14th of January, 1862, the plaintiff, in order to compel the defendant to pay his judgments, caused him to be arrested by the sheriff, in Massachusetts, upon final process. The defendant was taken before a master in chancery, and afterwards, before the master, took the insolvent debtor's oath according to the law of that State, and was thereupon discharged. Upon that occasion he falsely deposed and swore that he was not possessed of pecuniary means to the extent of twenty dollars, and that he had in good faith assigned all his property for the benefit of his creditors. From that time forward the defendant falsely pretended to the plaintiff and his other creditors that he was poor, and wholly unable to pay his debts, or any part of them. Having thus put his property beyond the reach of process upon the plaintiff's judgments, and procured his discharge from custody in Massachusetts, and led the plaintiff to believe he had no property out of which the judgments

could be collected, the defendant afterwards, on the 1st of January, 1864, in further pursuance of the conspiracy, pretended and represented that his son-in-law, one D. C. Keller, would purchase the judgments with his own means, and so procured the plaintiff, who acted upon the belief of the truth of the representations and of the perjured statement of the defendant, to assign the judgments to Keller for fifty per cent of their principal and interest, amounting to $5,104.52, whereas, in fact, the judgments were bought by Keller with money furnished by the defendant, and they were held in trust by Keller for the defendant until June 1, 1873, when Keller, at the instance of the defendant, caused satisfaction to be entered. Before and since the rendition of the judgments the defendant owned property worth exceeding $200,000. The title was held in secret trust for him by his brother Alvin and others, and was fraudulently concealed from the plaintiff until long after the assignment of the judgments. Within twelve months past the property was all reconveyed to the defendant, and he holds it by an indefeasible title. The plaintiff had no knowledge of the ownership of the property by the defendant, nor of the secret trust, nor of the falsity of his representations, as alleged, until during the year 1872.

The defendant filed an answer consisting of three paragraphs: —

1. He denied all the allegations of the petition.

2. He alleged that the causes of action set forth in the petition did not accrue within six years.

3. He averred that he was not guilty of any of the grievances set forth in the complaint at any time within six years before the commencement of the action.

The plaintiff's reply to the second and third paragraphs averred as follows: —

The defendant concealed the facts, that the judgments confessed in favor of Chapman and others were fraudulent; that Alvin C. Carpenter held the said property, real and personal, in trust for the defendant; that the defendant had committed perjury before the master in Massachusetts; that Keller had bought the judgments with the defendant's money, and for the defendant's use and benefit; that the defendant was in

fact the owner of the property, and that it was held by his brother and others in secret trust for him; and that his representations as to his insolvency were false and fraudulent.

It was averred further, that the concealment was effected by the defendant by means of fraud, perjury, and the other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit.

The defendant demurred to the last two paragraphs of the reply. The demurrer was sustained. The plaintiff not asking leave to amend, the court gave judgment against him, and he thereupon sued out this writ of error.

The only question presented for our consideration is whether the demurrer was properly sustained. The Statute of Limitations relied upon by the defendant declares: —

"The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards." 2 Rev. Stat. of 1876, p. 121. ". . . If any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." Id. 128, sect. 219. Both these provisions apply to actions for fraud. *Musselman* v. *Kent and Others*, 33 Ind. 453; *Cravens* v. *Duncan*, 55 id. 347. The statute begins to run when the fraud is perpetrated. *Wynne et al.* v. *Cornelison et al.*, 52 id. 312.

In the case in hand, the specific wrong complained of, and the gravamen of the action, is the transfer of the judgments against Carpenter for the consideration of fifty cents on the dollar of principal and interest, when it is averred they were good for the entire amount, and which transfer, it is alleged, was brought about by the fraud and misrepresentations of the defendant and Keller. It is averred in the complaint that they were assigned on the 1st of January, 1864. The cause of action then accrued, and the statute began to run. The averments of fraud, aside from this transaction, are only matters of inducement. The bar of the statute became complete on the 1st of January, 1870, unless the reply brings the case within sect. 219,

which declares that, where there is concealment, such actions may be brought within the time limited, after the discovery of the cause of action.

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

The provision in the statute of which the plaintiff seeks to avail himself was originally established in equity, and has since been made applicable in trials at law. There is no trace of it in the English statute of limitations of the 21st of James I., which was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country.

Having been imported from equity, the adjudications of equitable and legal tribunals upon the subject are alike entitled to consideration.

Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it.

It will be observed also that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments

confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. It should be borne in mind that when the judgments were assigned to Keller the country was in the throes of the civil war. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. A transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another.

The discovery of the cause of action, if such it may be termed, is thus set forth: "And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A.D. 1872, and a few weeks only before the bringing of this suit." There is nothing further upon the subject.

In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Stearns* v. *Page*, 7 How. 819, 829. "This is necessary to enable the defendant to meet the fraud and the time of its discovery." *Moore* v. *Greene et al.*, 19 id. 69, 72. The same rules were again laid down in *Baubien* v. *Baubien*, 23 id. 190, and in *Badger* v. *Badger*, 2 Wall. 95.

A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what

it was, how it was made, and why it was not made sooner. *Carr* v. *Hilton*, 1 Curt. C. C. 220.

The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. *Martin, Assignee, &c.* v. *Smith*, 1 Dill. 85, and the authorities cited.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy* v. *Greene*, 3 Myl. & K. 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." Angell, Lim., sect. 187 and note.

A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. *Buckner & Stanton* v. *Calcote*, 28 Miss. 432, 434. See also *Nudd* v. *Hamblin*, 8 Allen (Mass.), 130.

In *Cole* v. *McGlathry* (9 Me. 131), the plaintiff had given the defendant money to pay certain debts. The defendant falsely affirmed he had paid them, and fraudulently kept the money. It was held that the plaintiff could not recover, because he had at all times the means of discovering the truth by making inquiry of those who should have received the money.

In *McKown* v. *Whitmore* (31 id. 448), the plaintiff handed the defendant money to be deposited for the plaintiff in bank. The defendant told the plaintiff that he had made the deposit. It was held that, if the statement were false and fraudulent, the plaintiff could not recover, because he might at all times have inquired of the bank. In *Rouse* v. *Southard* (39 id. 404), the defendant was sued as part owner of a vessel, for repairs, and pleaded the Statute of Limitations. The plaintiff offered evidence that the defendant, when called on for payment, had denied that he was such owner. It was held that, as the ownership might have been ascertained from other sources, the

denial was not such a fraudulent concealment as would take the case out of the bar of the statute.

Numerous other cases to the same effect might be cited. They all show the light in which courts regard the qualification here in question, of the limitation which would otherwise apply.

The subject has been several times considered in the State of Indiana, whence this case came. In *Boyd* v. *Boyd* (27 Ind. 429), it was ruled that the concealment under sect. 219, which will avoid the statute, must go beyond mere silence. It must be something done to prevent discovery.

Stanley v. *Stanton* (36 id. 445) is instructive with reference to the case before us. In 1870, A. sued B. The complaint alleged that in 1848 B. falsely represented himself to A. to be the agent of C., to whom A. was indebted on a promissory note, and that A. paid the money to B. as such agent, and that B. promised tc pay it over to C., which he had not done. B. pleaded the Statute of Limitations. A. replied that he paid the money to B. on his claim that he was the agent of C.; that B. was not such agent, but concealed the fact from A., and promised A. to pay the money to C., which he had not done, and that by reason of the concealment A. did not discover the cause of action until the fall of the year 1869. It was held that, the concealment being all previous to the accruing of the cause of action, something more than the silence of B. was necessary to prevent the running of the statute, and that the action was barred. The concealment, it was said, must be the result of positive acts.

Wynne et al. v. *Cornelison et al.* (*supra*) was a case growing out of an alleged fraudulent conveyance. There, as here, there was a demurrer to a paragraph of the reply setting up concealment to countervail the defence of the Statute of Limitations. The allegations were not unlike those in the case before us. The judgment of the court below sustaining the demurrer was affirmed. The court said: "The Statute of Limitations is a statute of repose, and where its operation is sought to be avoided by the party liable to the action, the allegation and proof should bring the case clearly within the section. The allegation that the defendants pretended and professed to the

world that the transactions were *bona fide* transactions, is too general to amount to any thing." A wide and careful survey of the authorities leads to these results: —

The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation.

Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

The reply is clearly bad. It contains some vigorous declamation, but is wanting in the averment of facts, which are indispensable to give it sufficiency as a pleading, for the purpose intended. The complaint to which it refers does not help it. Further remarks are unnecessary. The demurrer was properly sustained by the Circuit Court.

Judgment affirmed.

PELTON v. NATIONAL BANK.

1. Although for purposes of taxation the statutes of a State provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares are assessed at their full value, is a violation of the act of Congress which prescribes the rule by which they shall be taxed by State authority.
2. In such case, on the payment or the tender of the sum which such shares ought to pay under the rule established by that act, a court of equity will enjoin the State authorities from collecting the remainder.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. John C. Grannis and *Mr. S. O. Griswold* for the appellant.

Mr. R. P. Ranney for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The Commercial National Bank of Cleveland, Ohio, organized under the act of Congress of 1864, creating a national banking system, and by virtue thereof entitled to sue in the circuit courts of the United States, brought this bill in equity to enjoin Pelton, the treasurer of the county of Cuyahoga, in which the city of Cleveland is situate, from collecting a tax alleged to be illegal. The chief ground of objection to the tax set out in the bill, and that which is mainly relied on in argument here, is, that the act of the Ohio legislature of April 12, 1877, entitled "An Act for the equalization of bank shares for taxation," under which the tax complained of was finally assessed, is in conflict with the Constitution of Ohio on the subject of the uniformity of taxation, and therefore void.

It is also distinctly alleged that the tax, as assessed, is greater than that assessed on other moneyed capital in the hands of individuals, citizens of that State, and is, therefore, in conflict with sect. 5219 of the Revised Statutes of the United States.

The decree below was in favor of the complainant, and Pelton appealed to this court.

It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws, and treaties of the United States, when those rights are invaded by State authority. But it is a very different thing for this court to declare that an act of a State legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the Constitution of the State.

It has long been recognized in this court that the highest court of the State is the one to which such a question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the State court, it would be indelicate to make such a decision in advance of the State courts, unless the case imperatively demanded it. We

will, therefore, inquire first whether the decree of the Circuit Court can be sustained on the other ground.

The bill states very distinctly that the principle on which the valuation of the shares of the bank for taxation is made "destroys the uniformity of the rule fixed by the Constitution, and violates the obligation thereby imposed to treat all property alike, to the end that all property may bear an equal burden of taxation, and is subversive of the act of Congress allowing such shares to be taxed and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital at the place where the bank was located." "The necessary effect," it is added, "of the proceedings had in the assessment and levy of the taxes standing against the shareholders of your orator, and now about to be enforced, has been to deprive such shareholders, both in the matter of valuation and equalization, of all benefit of the Constitution and general laws of the State, by which only uniformity in the burden of taxation upon all descriptions of property could be secured, to take from them the security afforded by the limitation in the act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively useless." The answer, by way of denial, says that "the taxes mentioned in said complainant's bill, assessed upon the shares of said complainant's banking association, are not taxed at a greater rate than is imposed by the State of Ohio upon other moneyed capital in the hands of individual citizens of said State resident in the city of Cleveland, where said banking association is established and located."

It is thus very clear that the question, whether the taxation of which the bank complained was a tax on its shares greater than that on other moneyed capital invested in Cleveland, was fairly raised by the pleading.

The argument is advanced here which we considered in *People* v. *Weaver* (100 U. S. 589), namely, that if the amount of tax assessed on these bank shares is governed by the same percentage on the valuation as that applied to other moneyed capital, the act of Congress is satisfied, though a principle of valuation is adopted by which inequality and injustice to the

owners of them must necessarily result. We do not propose to go over that argument again. The cases were considered together in conference, because they involved that principle. It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of Congress.

It is not asserted that any different percentage on the valuation established was applied to these two classes of capital. The bill very clearly shows that the source of the evil was in the unequal valuation.

Taking the answer, with the meaning which the counsel who drew it attaches in argument here to the words, "taxed at a greater rate," it may be said to amount, as a negative pregnant, to an admission that the valuation was unequal, as charged in the bill. Not only so, but it is not denied in argument that while all the personal property in Cleveland, including moneyed capital not invested in banks, was in the assessment valued far below its real worth, say at one-half or less, the shares of the banks, after deducting the real estate of the banks separately taxed, were assessed at their full value, or very near it. The only witness who testified on the subject in this case at all was the auditor of the county of Cuyahoga for the years 1876 and 1877, who had been for many years previously an employé in the auditor's office. He says that, as county auditor, he was a member of the board of county equalization, and acted as such in equalizing during those years the valuation of the shares of the various national and other banks; that the valuation placed on the shares of national banks was higher in proportion than the valuation on other personal property, including banking capital. He says that the matter was talked over in the board, and it was their aim to make the valuation higher, and that their valuation of national bank shares was intentionally higher than the assessed value returned by private banks.

It is necessary here to examine into the mode of assessing the tax as provided in the act of 1877, which related solely to the tax on bank shares. The first section required the cashier

of every incorporated bank to make report to the county auditor of the names and residences of its shareholders, the par value of each share, and other facts necessary to enable the auditor to ascertain the value of those shares. The second section required the auditor to assess them at their true value in money, after deducting the real estate, and to transmit the assessment with the report of the auditor to the annual board of equalization of the county in which the bank was located. This board was composed, in cities of the class to which Cleveland belonged, of the county auditor and six citizens appointed by the city council. By the third section this board was authorized to hear complaints and equalize the valuation of the shares of such banks or banking associations, as fixed by him, and with full authority to equalize such shares according to their true value in money. It is to be remembered that the witness whose testimony we have stated was the county auditor who made the first assessment or valuation of these shares, and he was a member of this city board which had authority to equalize that valuation. It was of this city board he was speaking when he said that they had assessed bank shares generally higher than other personal property, including, of course, other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so. It is also important to observe in reference to another view of the question, presently to be considered, that this discrimination was neither an accident or a mistake, nor a rule applied only to this bank, but that it was a principle deliberately adopted to govern their action in the valuation of all the shares of national banks, and was applied to them all without exception. It appears by the testimony of this witness that there were seven national banks in the city of Cleveland whose shares, as equalized by the city board for taxation, amounted to $3,236,500, to all of which this rule of valuation, making their taxes much higher than on other moneyed capital, was applied, and that this was done for two years at least, and probably many more.

This act of 1877, however, provided another board of equalization, composed of the auditor of state, treasurer of state, and attorney-general, to whom all the assessments of bank shares

made by the county and city boards were to be referred, and to whom no other property was referred, for an equalization, which included the whole State. This board could do no more than increase or diminish the valuation of such shares for each county and city, so as to make them conform to some standard of equality among themselves which that board might adopt. But the result of their action must be such that it did not increase or diminish the aggregate value of the amount returned by the county auditors of the whole State more than $100,000.

This board, for the taxes now in contest, increased the valuation of the shares of the complainant $250,000 above the sum of $912,000, at which it had been assessed by the county board, and it increased the valuation of the shares of all the national banks of Cleveland from the sum of $3,236,500 to $4,046,045.

It is thus seen that the auditor and the city board of equalization valued these shares higher in proportion to other moneyed capital in Cleveland to an extent which the witness does not state, but which may be supposed to be thirty per cent, as it is shown to be in comparison with real estate; and the State board added about one-fourth to that, so that the tax on the national bank shares, against which relief is sought in this suit, is between fifty and sixty per cent on its real value greater than on other moneyed capital, and, therefore, to that extent forbidden by the act of Congress.

For this injustice and this violation of the law there ought to be some remedy. To the specific one of an injunction by a suit in chancery, and, indeed, to any remedy by the bank, many objections are raised; but as all of them have been considered and overruled in the case of *Cummings* v. *National Bank* (*infra*, p. 153), which was argued at the same time this case was, it is unnecessary to repeat here what is said in that case.

As the complainant has paid so much of the tax as was not in violation of the act of Congress, we think the decree of the Circuit Court enjoining the collection of the remainder was right.

Decree affirmed.

MR. CHIEF JUSTICE WAITE dissented.

WORTHINGTON v. MASON.

1. No error is committed in refusing a prayer for instructions consisting of a series of propositions, presented as an entirety, if any of them should not be given to the jury.
2. When error is assigned upon the instructions given and those refused, the bill of exceptions must set forth so much of the evidence as tends to prove the facts, out of which the question is raised to which the instructions apply.
3. Where, therefore, the bill of exceptions embodies only the instructions given and those refused, this court will not reverse the judgment.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action brought by Martha W. Mason against Edward T. Worthington and Isaac M. Worthington, administrators of Elisha Worthington, deceased, to recover for work and labor done and services rendered to the intestate. The jury rendered a verdict for the plaintiff in the sum of $12,000, for which there was judgment, and the administrators sued out this writ of error.

The facts are sufficiently stated in the opinion of the court.

Mr. Augustus H. Garland for the plaintiffs in error.

Mr Albert Pike, *Mr. Albert N. Sutton*, and *Mr. Luther H. Pike* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The errors assigned in this case relate solely to prayers for instructions refused by the court and to exceptions to its charge. The bill of exceptions shows a paper signed by the defendants' counsel, in which the court is asked to affirm a series "of propositions of law as governing the case," seven in number. They were presented as a whole, refused as a whole, and excepted to in the same manner. If any one of them was rightfully rejected no error was committed, because it was not the duty of the court to do any thing more than pass upon the prayer as an entirety. *Beaver* v. *Taylor et al.*, 93 U. S. 46; *Transportation Line* v. *Hope*, 95 id. 297. We shall presently see why there is no error in the rejection of this prayer.

The charge of the court in full is embodied in the record, and to this the defendant took two exceptions. They are thus stated: —

"And the defendant excepted at the time said charge was given by the court to the following parts thereof, to wit, to so much of said charge as states the law to be that if Colonel Worthington, the owner of the plaintiff as a slave, took the plaintiff to Oberlin, in the State of Ohio, and there placed her in school to be educated, the Constitution and laws of Ohio mediately dissolved the relation of master and slave previously existing between Colonel Worthington and the plaintiff, and that the plaintiff thereby became a free woman, and could never thereafter lawfully be claimed or held by Colonel Worthington as his slave in virtue of his previous ownership of her, and that the subsequent return of the plaintiff from the State of Ohio to the residence of the intestate in this State did not affect her liberty or rights as a free woman which she had acquired by the voluntary action of the intestate and by the operation of the Constitution and laws of the State of Ohio.

"And defendants, also, at the time excepted to the following clause of said instructions, to wit, 'And in considering the question of what would be reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to, and if you find such special agreement a contract was made, that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff in payment for such services specified portions or parcels of his estate, and that the plaintiff did remain with the intestate and perform the required services until the death of the intestate, then, as throwing light on the transactions between the parties, and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value as disclosed by the evidence of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the special contract (if you find it proven) for this purpose only, it rests

with you under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable, and just compensation to the plaintiff for her services, but in no event can you allow the plaintiff a greater sum than the value of the specific property which plaintiff claims was to be conveyed or devised to her therefor.'"

There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of the reference to it in the charge of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical and wholly unwarranted by any testimony before the jury.

The exceptions to the charge of the court, just recited, are in the same condition. The principal one, to which the argument of the plaintiffs in error is chiefly directed, is that the court erred in telling the jury that "if Colonel Worthington, the owner of the plaintiff as a slave, took her to Oberlin, in the State of Ohio, and placed her in school to be educated, the Constitution and laws of Ohio immediately dissolved the relation of master and slave previously existing between Colonel Worthington and the plaintiff, and that the plaintiff thereby became a free woman, . . . and her subsequent return to the residence of Worthington in Arkansas did not affect her rights to freedom."

The plaintiff nowhere states in her petition that she was ever the slave of Worthington, though she alleges that she was his natural daughter.

As none of the evidence given or offered on the trial is set out in the bill of exceptions, we cannot presume against the verdict that plaintiff ever was the slave of Worthington.

The defendant in error raises this objection, and the very learned counsel of the plaintiffs in error, who did not try the case below, admits this objection to be fatal to his effort to reverse the judgment, unless we can hold, from language used by the judge in his charge to the jury, that the fact was proved.

It is certainly true that the judge does say, in that part of his charge which relates to that subject, that the former slavery was a conceded fact in the case. His language, in addressing the jury, while discussing the propositions of the defendants' counsel, is as follows: —

"Among the conceded facts in the case are these: That the mother of the plaintiff was a slave, and the property of Colonel Worthington at the date of plaintiff's birth, and that the plaintiff is the natural daughter of Colonel Worthington. The mother of the plaintiff having been a slave at the date of the plaintiff's birth, it results that she was born a slave, and at her birth was the property of Colonel Worthington, her natural father."

But we do not look to the charge of the judge for the state of the evidence on which that very charge is to be held right or wrong. The judge cannot be permitted to cure the error of his law propositions by assuming as facts what may not have been proved. This very part of the charge was excepted to by the plaintiffs in error on the ground that its law was erroneous. If the verdict had been for them, the plaintiff below might have excepted, because the facts thus stated were *not* conceded. As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the latter, complaint is made of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply.

This is not to be sought for, however, in the comments of the court to the jury on the testimony.

The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them.

It is not sufficient to show that the judge assumed this in his charge to the jury, it must be certified to this court distinctly under his hand.

It would be very dangerous to permit verdicts fairly rendered to be reversed in this court on the recitation of facts supposed to be proved, found only in a long comment of the judge on the testimony.

This would be to usurp the function of the jury, and the verdict might be set aside in this court because the court below understood the evidence in one way, and the jury in another; or, as in the present case, because the judge was of opinion that a fact was proved which the jury refused to believe.

When, therefore, the question is on the soundness of the judge's law as given to the jury, he must, on his due responsibility, certify to the appellate court, and not to the jury, the evidence on which he pronounced the law.

We are not furnished by counsel with any case precisely in point. Probably no bill of exceptions was ever certified to an appellate court before, which contained nothing but the charge and the objections made to it.

Judgment affirmed.

CUMMINGS v. NATIONAL BANK.

The Constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property, according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital, and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the county boards. Throughout a large part of Ohio, including Lucas County, in which A., a national bank, is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The State board of equalization of bank shares increased the valuation of them to their full value. A. brought its bill against the treasurer of that county, praying that he be enjoined from collecting a tax wrongfully assessed on those shares. *Held*, 1. That the statute creating

the board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing *all property* at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a statute cannot be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration. 2. That the rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with that Constitution, and works manifest injustice to the owners of bank shares. 3. That when a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power. 4. That the appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. J. K. Hamilton for the appellant.

Mr. Wager Swayne for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The Merchants' National Bank of Toledo, a banking association organized under the national banking law of the United States, brought its bill in equity to enjoin the treasurer of Lucas County, within the limits of which it is established, from collecting a tax wrongfully assessed against the shares of its stockholders, payment of which was demanded of the bank. The feature of the assessment to which the complainant objects is that in the valuation of the shares of the bank for the purpose of taxation they were estimated at a much larger sum in proportion to their real value than other property, real and personal, in the same city, county, and State, and that this was done under a statute of the State, and by a rule or system deliberately adopted by the assessors for the avowed purpose of discriminating against the shares of all bank stock. Though there is in the argument of counsel an attempt to invoke the aid of the act of Congress relating to the taxation of the shares of the national banks, we are unable to see, either in the origi-

nal or supplemental bill, any sufficient allegation on that subject. One clause of the bill asserts that the law of the State (which is the principal subject of complaint), and the tax and assessments under it, are in violation of the Constitution of Ohio and the act of Congress; but the vice charged against the assessment is that it is "three times the proportionate amount which is charged to real property, moneys, and credits listed for taxation in said county of Lucas and charged upon said duplicate."

The standard of comparison in the act of Congress is, "other moneyed capital in the hands of individual citizens of the State." We do not think we are called on to decide whether a tax which is assailed on the ground of violating that statute is void for that reason until the case, by positive averment, or by necessary implication of such averment, is shown to be within the prohibitory clause.

But the bank has the same right under the laws and Constitution of Ohio to be protected against unjust taxation that any citizen of that State has, and by virtue of its organization under the act of Congress it can go into the courts of the United States to assert that right. If, therefore, the assessment on its shares was a violation of the constitutional provision of that State concerning uniformity of taxation, the Circuit Court had jurisdiction of that question, concurrent with the State courts, and we must review its decision.

It is, however, manifest from the form of the bill in this case and the tenor of the argument in this court, that its object is to have a decision that the State statute of 1876, which provides specifically for taxation of bank shares, and for nothing else, is void as a violation of the Constitution of that State, as the case of *Pelton* v. *National Bank* (*supra*, p. 143) against the treasurer of Cuyahoga County by the bank at Cleveland is designed to test the subsequent statute of 1877, which is a substitute for that of 1876.

The two cases were advanced on our docket out of their order, and heard at the same time by this court, on the ground that they both involved the revenue law of the State. We have expressed in that case the reasons which induced us to avoid deciding that question, if it can be done without prejudice to

the rights of the parties involved, and we shall see as we progress in the examination of this case whether it can be done.

But we must dispose of some preliminary questions, the first of which is the supposed incapacity of the bank to sustain this or any other action for the alleged grievance, because, as the persons taxed are the individual shareholders, the damage, if any, is theirs, and they alone can sue to recover for it or to prevent the collection of the tax.

The statutes of Ohio under which these taxes are assessed require the officers of the bank to report to the county auditor who makes the original assessment, the names of all its stockholders, their places of residence, and the amount held by each of them, and all the other facts necessary to a fair assessment.

It also authorizes the bank to pay the tax on the shares of its stockholders and deduct the same from dividends or any funds of the stockholders in its hands or coming afterwards to its possession, and it forbids the bank to pay any dividends on such stock, or to transfer it or permit it to be transferred on their books, so long as the tax remains unpaid.

In *National Bank* v. *Commonwealth* (9 Wall. 353), we held that a statute of Kentucky, very much like this, which enabled the State to deal directly with the bank in regard to the tax on its shareholders, was valid, and authorized a judgment against the bank which refused to pay the tax. It is true, the statute of Kentucky went further than the Ohio statute, by declaring that the bank *must* pay the tax, while the latter only says it may. But the Ohio statute, by the remedies it provides, places the bank in a condition where it must pay the tax, or encounter other evils of a character which create a right to avoid them by instituting legal proceedings to ascertain the extent of its responsibility before it does the acts demanded by the statute.

It is next suggested that since there is a plain, adequate, and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

The reply to that is that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders, — an agency created by the statute of the State. If it pays an unlawful tax

assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends, and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere.

But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Sect. 5848 of the Revised Statutes of Ohio, 1880; vol. liii. Laws of Ohio, 178, sects. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* v. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

The statute also answers another objection made to the relief sought in this suit, namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction, among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those

whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given.

Art. 12, sect. 2, of the Constitution of the State of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property, according to its true value in money;" and sect. 3, that "the General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues of every description — without deduction — of all banks now existing, or hereafter created, and all bankers, so that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals."

In construing this provision of the Constitution the Supreme Court of Ohio has said that "taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property must be taxed alike, *equally*, which is taxing by a uniform rule." *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 15.

We are not aware that this decision has ever been overruled. It will be seen also that the Constitution requires all property to be taxed "according to its true value in money." It is said

that the various statutes for assessing the taxes are all based upon this principle of valuation, and a statute of May, 1868, is cited in the brief as enacting that all property of every description within the State shall be entered for taxation at its true money value. If this principle, so clearly embodied in the Constitution as expounded by the Supreme Court, had been made the rule of action by those who have charge of the administration of the laws for assessing taxes, there could be no place for the complaint of the bank.

The State, however, by her legislation has adopted a system of valuation of property into which we must look for a moment to enable us to appreciate the effect of the evidence as to the actual valuation of which complaint is made in this case.

Instead of having all property subject to taxation valued by one commission or authorized body, there are at least four different bodies acting independently of each other in regard to as many different classes of property in the process of final estimate of values for taxation.

The first of these concerns real estate, which is valued once in each decade, that valuation remaining unchanged during the whole ten years, except that what is called the new constructions of each year is added to the original sum. The assessments of real estate by the district assessors in the county, and the ward assessors in the large cities, is first submitted to a county or city board of equalization, and this again to a State board of equalization, to be elected once in ten years by the electors of each senatorial district. Of this board the auditor of state is a member. The functions of this final board seem to be to increase or decrease the county valuations of real estate returned to them, according as they are found to be above or below the true money value of the property. But in doing this they only act on a county or city valuation as a whole, and not on the particular pieces of property assessed, and they cannot reduce or increase the entire valuation for the State more than twelve and a half per cent of the aggregate.

Personal property (other than bank shares and railroad property) and the new constructions in real estate are assessed annually by district and ward assessors in the counties and cities, and their assessment is returned to a county or city

board of equalization, and we are not aware that this valuation is subject to any further equalization or submitted to any further correction. This assessment, of course, includes all personal property, money, credits, and investments of capital other than those in banks and railroads. In regard to railroads, there is a submission of all of them to a State board of equalization, which finally passes upon the assessments of the counties. In reference to banks, which are first assessed by the county auditor, there is also a State board of equalization, whose function is limited to equalizing throughout the State the valuation of *the shares of incorporated banks*.

We thus see that one board of equalization has charge of the valuation of the real estate of the whole State once in every ten years, another has charge of the valuation of railroad property every year, and a third has charge of the valuation of shares of incorporated banks every year, and the amount fixed by these State boards is in every instance the final basis of taxing that species of property for State and county purposes.

We are asked to decide that, as to this final board of equalization of bank shares, whose function is to equalize the valuation of those shares, *as among themselves*, throughout the State, with no power to consider the valuation of real estate which comes before another board only once in ten years, or other personal property and invested capital which never comes before any State board, that its operations must necessarily produce inequality in valuation as it regards other property, and is therefore void, as in conflict with the State constitutional rule of uniformity, and with the third section of the same article of the Constitution, declaring "that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals."

But there are two reasons why we cannot so hold. First, It might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to its real value than that of any other property, and therefore plaintiff would have no ground of complaint. And, secondly, what is more important, if these original valuations and equalizations are based always, as the Constitution requires, on the actual money value of the property assessed, the result, except as it

might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.

The evidence, we are compelled to say, shows this to be true of the case before us.

It may be summed up in the statement, that the assessors of real property, the assessors of personal property, and the auditor of Lucas County, in which is the city of Toledo, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one-third of its actual value, and money or invested capital at six-tenths of its value, and that the assessment of the shares of incorporated banks, as returned by the State board of equalization for taxation to the auditor of Lucas County, was fully equal to the selling prices of said shares and to their true value in money. This is shown by the testimony of four or five district assessors, by the auditor of the county for the year 1876, and for several previous years, who had been long an employé in that office. It is also shown by this witness that at one time the auditor of Lucas County held a conference with the auditors of the counties of Fulton, Williams, Defiance, Henry, Paulding, Ottawa, Wood, Sandusky, Seneca, and Van Wirt, and that the rule by which property was valued in Lucas was the result of this conference, and was to be applied in all these counties. The district assessors, whose duty it was to make this primary valuation of all personal property (except bank stocks and railroad property), also testify that for the year 1876 they had a meeting, and adopted that rule of valuation as their guide, and so applied it. All this is uncontradicted. Nor is there any

question that while the auditor probably returned the bank shares of Toledo at six-tenths of their value, or thereabouts, the State board of equalization increased it so that, as the cashier of this bank swears, its shares were assessed at their full cash value.

The testimony before us in the case argued with this shows that the same rule of valuation was adopted in Cuyahoga County with the same effect on the shares of the incorporated banks of Cleveland. It probably pervades the system of assessment for the entire State of Ohio, and may have caused the necessity of boards of equalization quite as much as mistakes of judgment or other sources of inequality which these boards are designed to remedy. But while these separate boards, acting upon returns of different classes of property, and limited in each case to equalizing the value as between the same class in different counties, have no common or united action among themselves, and no common power to equalize the valuation of the different classes of property in relation to each other, it is obvious that their capacity to produce the uniformity which the Constitution was intended to effect is very small indeed. They have no power at all to affect the valuation of real estate except once in ten years. They have no power over the valuation of personal property, including all money capital, except bank shares, as it is fixed by the county and city boards; and these being beyond their control, the effort of the State board to raise the assessment of the shares of banks to their value in money only increases the glaring inequality arising from the valuation of the county boards.

It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burroughs, Taxation, p. 227, sect. 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.

And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual value, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting personal property, and especially invested capital, to the inspection of the assessor and the grasp of the collector. The effort of the land-owner, whose property lies open to view, which can be subjected to the lien of a tax not to be escaped by removal, or hiding, to produce something like actual equality of burden by an undervaluation of his land, has led to this result. But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy. The complainant having paid to defendant, or into the Circuit Court for his use, the tax which was its true share of the public burden, the decree of the Circuit Court enjoining the collection of the remainder is

Affirmed.

MR. CHIEF JUSTICE WAITE dissenting.

I feel compelled to withhold my assent to this judgment. There can be no doubt that the shares of this bank were overvalued as compared with other property in the city; but if a State provides by a valid law for the valuation of property for taxation, and furnishes appropriate tribunals for the correction of errors before a tax is assessed if complaint is made, I think it is not within the power of a court of equity to enjoin the collection of the tax simply because of an inequality in valuation, — and this as well when the error arises from the adoption by the valuing officers of a wrong rule applicable to many cases, as from a mistake in judgment as to a single case. The valuation as finally fixed by the proper officers, or equalizing

board, under the law, is, in my opinion, conclusive when there has been no fraud. As it seems to me, this case comes within the operation of this principle.

UNITED STATES v. LAWSON.

The act of Feb. 26, 1867 (14 Stat. 410), abolishing a former collection district in Maryland, and forming from a portion thereof a new district, provides that the collector "shall receive an annual salary of $1,200." A. held the office of collector from April 19, 1867, until April 1, 1875. On July 18, 1867, the Commissioner of Customs required him, in writing, to account for *all* fees received by him as such. He accordingly thereafter paid them into the treasury. *Held*, 1. That in addition to his salary A. was entitled to the fees and emoluments allowed to such officers by pre-existing legislation. 2. That having paid them into the treasury pursuant to a peremptory order of his superior officer he was not thereby precluded from recovering them in a suit against the United States.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. John Scott, Jr., for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Compensation to collectors of the customs from the organization of the government to the present time has been chiefly derived from certain enumerated fees, commissions, and allowances, to which is added a prescribed sum, called salary, much less than a reasonable compensation for the service required of the officer. 1 Stat. 64, 316, 627, 786.

Sufficient appears to show that by these several acts certain enumerated fees and commissions were made payable to the collectors of the customs, and that they were also entitled to certain proportions of fines, penalties, and forfeitures. By the same acts they were required to keep accurate accounts of all fees and official emoluments by them received, and of all expenses for rent, fuel, stationery, and clerk-hire, and to report the same annually to the Comptroller of the Treasury, but

they were allowed to retain to their own use the whole amount of the emoluments collected from those sources, without any limitation. Maximum rate of compensation was subsequently prescribed, which was $5,000, and it was made applicable to all collectors without any discrimination. 2 id. 172.

It was provided by that act that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than $5,000, the surplus should be accounted for and paid into the treasury. Districts for the collection of the customs were, at a later period, divided into two classes, usually denominated the enumerated and the non-enumerated ports, and the maximum rate of compensation to collectors was diminished. 3 id. 695.

Under that act the maximum for the enumerated ports was $4,000 and for the non-enumerated ports $3,000, and the provision in respect to both classes was that the excess, after deducting the expenses incident to the office, should be paid into the treasury as public money.

For a considerable period of time these regulations were satisfactory, but when the policy was changed, the free list much enlarged, and the rates of duty reduced, experience showed that the emoluments of collectors from those sources were not sufficient to give them a reasonable compensation. Temporary expedients were resorted to for several years by the passage of an annual compensation act, as will be seen by reference to the acts of Congress during that period. *United States* v. *Walker*, 22 How. 299–308; *United States* v. *Macdonald*, 5 Wall. 647, 655.

Importers, under various antecedent acts of Congress, were allowed to place certain goods in the public stores under bond, at their own risk, without the payment of the duties, until the goods were withdrawn. Public stores were accordingly rented, and as the business increased, the rent and storage received by the collector of the merchants making deposits in the stores exceeded the amount paid to the owners of the same, and there was no law requiring the collector to account for the excess. Congress interposed and regulated the subject. 5 Stat. 432; Rev. Stat., sect. 2647.

By that enactment collectors are required to include in their

quarterly accounts all sums received for rent and storage in the public stores beyond the rents which are paid to the owner, and if the excess in any one year exceeds $2,000, it is made their duty to pay such excess into the treasury as part and parcel of the public money. *United States* v. *Macdonald*, 2 Cliff. 270, 282.

Two thousand dollars of the amount, under the act of Congress then in force, might be retained by the collector in addition to the amount received from other lawful sources of emolument, provided the latter did not exceed the maximum rate allowed to the office. Receipts from the other sources of emolument were to be accounted for as before; but the effect of the new provision was to add $2,000 to the compensation of a collector, if his office earned that amount from rent and storage. Custom dues of every kind received by a collector are now required to be credited in his quarterly accounts, no matter from what source of emolument the money is derived; and the provision is, that whenever the emoluments of any collector, other than one of the enumerated ports, "shall exceed $3,000, the excess shall in every such case be paid into the treasury for the use of the United States; but the provision does not extend to fines, penalties, or forfeitures, or the distribution thereof." Rev. Stat. 2691.

Apply the rule prescribed in that provision to the case before the court, and it is clear that the collector, if the compensation he received from other sources of emolument, after deducting the incidental expenses of his office, amounted to $3,000, would not have a right to retain any portion of the excess received for rent and storage beyond what he paid to the owners of the stores rented. His right in such a case, provided the aggregate of his receipts from the other sources of emolument, after deducting the incidental expenses of his office, was insufficient to give him the maximum compensation allowed, would be to retain enough from the amount derived from that source to make up the deficit.

Judgment was rendered in favor of the petitioner, and the United States appealed to this court. No formal assignment of errors is filed, but the proposition submitted in argument is that the petitioner voluntarily paid the amount claimed into

the treasury, and that he cannot now maintain any action to recover it back.

Nothing appears in this case to warrant the conclusion that the petitioner ever collected any thing for rent and storage, or that any such matters are in controversy in this case, as will hereafter more fully appear.

Special findings were made by the court to the effect following: That the petitioner held the office of collector of the port of Crisfield from April 19, 1867, to April 1, 1875, and that he received from the United States during that period a salary at the rate of $1,200 per annum; that on the 18th of July subsequent to his appointment the Commissioner of Customs wrote him, acknowledging the letter of the petitioner of a prior date, and stated that the $1,200 salary given him by the act creating his district constituted his entire compensation, and that he was required to account for all fees.

Directions could hardly be more peremptory; and the Court of Claims finds that in consequence of that letter the petitioner accounted for and paid into the treasury all moneys collected by him as duties on imports and tonnage, except what was expended for office-rent, fuel, and expenses, and for the services of his deputy and clerks.

During his term of office he collected as fees $9,066.43, of which he paid out $623.48 for office-rent, fuel, and expenses, and $2,492.29 for the services of his deputy and clerks, for which sums he was allowed credit in his accounts.

None of these matters can be controverted; and the fifth finding of the court below shows the balance of the sum collected as fees, to wit, the sum of $5,950.66, was by him, without protest, paid into the treasury of the United States. All of the facts are stated in the findings of the court; and they also find that the petitioner, under the acts of Congress, collected tonnage taxes to the amount of $11,839.23, and that he paid the same to the government.

It appears that the district in which the petitioner is collector was formed out of a part of a district created by the original collection act, and that it was continued as such until the passage of the act abolishing it, and that the act creating the new district provided that the collector of the

same shall receive an annual salary of $1,200. 1 Stat. 33; 14 id. 410.

Much discussion of the proposition that the petitioner would have been entitled to all he demands if he had seasonably claimed it or made the payment, when it was officially required, under protest, is certainly not required, as it is not denied in argument; but if it were required to give the authority for the conceded right, the effort would not be attended with much difficulty. Express provision was made by the second section of the Compensation Act, that collectors might demand and receive the fees therein prescribed. They were also given a salary of $250, and were required to keep an accurate account of all fees and official emoluments and all expenditures for rent, fuel, stationery, and clerk-hire, and to transmit the same under oath to the Comptroller of the Treasury. 1 id. 706–708. Corresponding provision is now contained in the Revised Statutes which is applicable to the case under consideration. Rev. Stat., sect. 2654.

Percentages for the collection of duties of import and tonnage were also allowed by the original act, and are contained in the Revised Statutes. Sect. 2659. Three per cent is allowed to the collector of this port, and he is also entitled to a salary of $200 by the original act, which for certain purposes may still be regarded as in force. Accounts are still required to be rendered by the officer under oath. Sects. 2639, 2641.

Instances may perhaps be cited where it would be reasonable to conclude that Congress intended to make the salary of the collector his entire compensation, by using appropriate words to manifest such intention; but it is clear to a demonstration that the general rule is the other way, as appears from all the compensation acts passed since the Treasury Department was organized. Salary in all the acts is one of the allowances, but it will be found in every such act that fees, commissions, other allowances, or percentages are also included in the list. Proof of that proposition is found in the Revised Statutes as well as in the acts of Congress which were the subject of revision. If more be needed to confirm the proposition, it will be found in the decisions of this court, to which

reference has already been made. It is not even suggested that the acts of Congress allowing fees, percentages, and commissions are repealed, and, if not, it may well be that such allowances were intended, as heretofore, to supplement the small salaries prescribed in cases like the present.

Suppose that is so, still it is contended by the United States that the payments were voluntarily made, and that the money cannot be recovered back. Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that, if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of the collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we cannot hold that the payments were voluntary, within the meaning of the judicial rule which, in consequence of the payment, denies to the party making the same the right to recover it back.

Beyond all question, the money was wrongfully exacted, and it is equally certain that in equity and good conscience it ought to be returned, or so much of it as is not barred by the Statute of Limitations. It was demanded of him by his official superior, and the act of Congress exposed him to a penalty if he refused to comply. 14 Stat. 187; Rev. Stat., sect. 3619.

Comment upon the plea of limitations is unnecessary, as the charges barred by the statute were excluded from the judgment.

Governed by these views, we hold, as the court below held, that the petitioner is entitled to recover the fees paid into the treasury after May 22, 1869, as stated in the opinion of the court, less $2.30 of tax paid on his salary, making, as properly adjusted in the opinion of the court below, the sum of $5,605.38, for which the judgment was rendered.

Judgment affirmed.

UNITED STATES v. ELLSWORTH.

The ruling in *United States* v. *Lawson* (*supra*, p. 164), that a collector of customs, who, pursuant to the peremptory order of the Commissioner of Customs, pays into the treasury moneys to which he is lawfully entitled as a part of the fees and emoluments of his office, is not precluded from recovering them in a suit against the United States, reaffirmed and applied to this case.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor General for the United States.

Mr. J. W Douglass, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Goods imported at the period mentioned in the declaration might be stored, under the warehouse acts, in the public stores legally established at the port of which the petitioner is collector.

Due indemnity to the United States was given by the railroad company, at whose request the public stores in this case were established, against loss arising from decay, waste, or damage to the goods there deposited.

Moneys to a large amount, as specified in the declaration, were paid to the petitioner, as such collector, to reimburse the treasury for the salaries of inspectors having charge of the goods deposited in such stores. Pursuant to the act of Congress, the collector rendered, under oath, a quarter-yearly account to the treasury of the sums of money collected for rent and storage beyond the rent paid for the stores to their owners. 5 Stat. 432; Rev. Stat., sect. 2647.

Statutory requirement also exists elsewhere that all moneys received by collectors for the custody of goods in bonded warehouses shall be accounted for as storage, under the fifth section of the prior act. 14 Stat. 188. Such requirement is enforced by a penalty, as follows: That every officer or agent who neglects or refuses to comply with the same "shall be subject to be removed from office, and to forfeit to the United States any share or part of the moneys withheld to which he might otherwise be entitled." Rev. Stat., sect. 3619.

Yearly payments of the same, as the petitioner alleges, were made by him through mistake, and that he made application to the commissioner for leave to correct his account; but the commissioner refused the request, and declined in advance to repay the petitioner any part of the said moneys. What the petitioner alleges in that regard is that a part of the money derived from that source, not exceeding $2,000 in any one year, belonged to him, under the act requiring accounts as to rent and storage.

Annual payments on that account were made by the petitioner, as he alleges, for the period of eight years during which he held the office, amounting in all to the sum of $14,535.23. Maximum compensation of his office is $4,500, as follows: Salary, fees, and commissions not exceeding $2,500. Rev. Stat., sect. 2675. Nor exceeding $2,000 in any one year from rent and storage. Id., sect. 2647.

Out of the annual receipts for rent and storage the plaintiff claims an amount not exceeding $2,000 in any one year, to which he adds the entire receipts from all other sources of emolument, and from the aggregate of these receipts he deducts the amount of his yearly compensation, and by that mode of computation his claim is as stated in the declaration.

Two pleas were filed in behalf of the United States: 1. They deny each and every allegation of the petition. 2. They allege that the petition was not filed within six years after the claim first accrued.

Charges barred by the Statute of Limitations were rejected, and the court below rendered judgment in favor of the petitioner for the balance, amounting to the sum of $11,954.73, as appears by the transcript.

Special findings of fact were duly filed in the record, as required by the rules of the court, to the effect following: That the petitioner was collector of the port from March 5, 1870, to Jan. 25, 1878, and the act of Congress shows that the maximum of his compensation was as stated in his petition; that two freight depots are located at that port, and that from the time the petitioner became collector, to June 15, 1877, the apartments of the depots were constantly and exclusively used for the storage of goods in bond, seized goods, and goods unclaimed.

Compliance with the treasury regulations in establishing such depots is also shown by the findings of the court, and that two inspectors were constantly kept there in charge of goods stored in those depots during that period, and that the amount of their salaries was annually reimbursed to the United States through the collector by the railroad companies at whose request the depots were established, as shown by the statement exhibited in the fifth finding of the court. All these amounts were duly entered in the quarterly accounts of the petitioner, and were paid to the treasurer of the United States in compliance with official instructions.

Peremptory instructions were given to the officer that all moneys of every description, not received by warrant on the treasury, must be actually deposited, as they would be charged in the collector's account. His compensation, as received, was derived wholly from the other statutory sources of emolument, the findings of the court showing that he was not paid any thing out of the yearly amounts collected from rent and storage. Due credit was given for the annual amounts he received from the other sources of emolument during the six years, within the Statute of Limitations, as exhibited in the seventh finding of the court; and the same finding also contains a statement showing the additional amounts required for each of those years to bring up the compensation of the collector to the maximum rate.

Argument to show that the aggregate received from all sources of emolument, including the receipts from rent and storage, is sufficient to justify the claim of the petitioner is certainly unnecessary, as it is clear to a demonstration that the computations of the court below are correct. Plainly it follows from those computations that the collector is entitled to that rate of compensation, unless it be denied that the receipts from rent and storage, as explained in the opinion in *United States* v. *Lawson* (*supra*, p. 164), are not properly included in that aggregate.

Sums received for rent and storage, not exceeding $2,000 in any one year, if duly included in the quarterly accounts of collectors, are as much due to such officers of the non-enumerated ports as to the incumbents of the larger offices, and their right to the same rests on the same foundation. Actual necessity has

always existed, since the Treasury Department was established, for more storehouses for the deposit and safe-keeping of imported merchandise than the United States owned, and it cannot be doubted that all such as have been placed under the statutory control of collectors and have been used for that purpose according to law are, during the period they are so controlled, used, and occupied, public storehouses, within the meaning of the act of Congress requiring collectors to include receipts from that source in their quarterly accounts, and allowing them to retain out of the same a sum not exceeding $2,000 in any one year. *United States* v. *Macdonald*, 5 Wall. 647, 659; s. c. 2 Cliff. 270, 282.

None of these matters are controverted by the Solicitor-General; but he insists that the payments were voluntary, and that the accounts having been settled cannot be opened, even if it appears that the demand and payments were both made under a mistake of law. Responsive to the first suggestion, the same answer may be given to it as that given by the court to a similar suggestion in the preceding case.

You will also bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the treasury, must be actually deposited. Had he added, If you fail to comply, the law will be enforced, his meaning could not be misunderstood, as the act of Congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the treasury at as early a day as practicable, without any abatement, &c. Rev. Stat., sect. 3617.

Penalties are prescribed for a non-compliance with that requirement, as follows: Every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office and to forfeit any part or share of the moneys withheld, to which he might otherwise be entitled. 14 Stat. 187; Rev. Stat., sect. 3619.

Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action

to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner.

Judgment affirmed.

WRIGHT v. BLAKESLEE.

A., who died in October, 1846, devised his real estate to his daughter for life, with remainder in fee to her son B., should he survive her. She died in September, 1865. B. was duly notified to make the return required by sect. 14 of the Internal Revenue Act of June 30, 1864 (13 Stat. 226), and on his refusal to do so was summoned in June, 1867, to appear before the assessor of the proper district. He appeared, and claimed "that the estate was not liable to assessment for a succession tax." Thereupon the assessor assessed a tax of one per cent upon the full value of the property, and added thereto a penalty of fifty per cent and costs, — all of which B., July 20, 1867, paid under protest to the collector. The Commissioner of Internal Revenue, to whom B. appealed, rendered a decision adverse to his claim, July 3, 1873. B. brought this action, June 24, 1875, against the collector to recover the amount so paid. *Held*, 1. That the action was not barred by the Statute of Limitations. 2. That the tax was properly assessed and the penalty erroneously imposed.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. A. C. Miller for the plaintiff in error.
The Solicitor-General, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action brought by B. Huntington Wright, the plaintiff in error, against Blakeslee, the defendant, formerly collector of internal revenue for the twenty-first revenue district of New York, to recover the amount of a succession tax collected from the plaintiff and his sister in 1867, the latter having assigned her interest to the plaintiff.

A jury was waived, and the cause was tried by the court. From the findings the following facts appear: Henry Huntington, of Oneida County, New York, died in October, 1846, leaving a will, by which, amongst other things, he devised to

his executors certain real estate, in trust, to receive the rents and profits, and apply the same to the sole and separate use of his daughter Henrietta (if a *feme covert* at his death) during the term of her natural life, and at her decease, if she should leave issue surviving, the testator gave and devised the said real estate to such issue absolutely and in fee. When the testator died, his daughter Henrietta was the wife of one Benjamin H. Wright, and had two children living, B. Huntington Wright (the plaintiff) and a daughter. Henrietta died in September, 1865, leaving her said two children and her husband surviving. In June, 1867, the plaintiff and his sister were notified by the assessor to make return, as required by the fourteenth section of the Internal Revenue Act of June 30, 1864 (13 Stat. 226); and they both refused and declined to make any return, or give any knowledge or information as to the quantity, location, or value of the real estate, and thereupon they were summoned to appear before the assessor in relation thereto. They appeared accordingly, and claimed that the estate was not liable to assessment for a succession tax. The assessor decided against them, and assessed a tax of one per cent on the full value of the property, and added thereto a penalty of fifty per cent and expenses, making in all $595.59. In June, 1867, the assessor notified the parties of the tax imposed, the value of the property, and the penalty affixed. The assessment or tax, with the penalty, was placed upon the assessment roll, and delivered to the collector (the defendant) for collection, and he notified the parties to pay the tax.

On the 31st of July, 1867, the parties paid the tax under protest, the tax paid amounting to $595.59, of which $389.56 was tax, $194.78 was penalty, and $11.25 was the expenses for making the assessment and valuation. The amount assessed upon each, viz. B. Huntington Wright and Henrietta H. Wright, was $297.29.

On the 5th of October, 1872, the Commissioner of Internal Revenue wrote the parties that the claim to have the tax refunded had not been submitted to the department, and forwarded them a blank to be filled up and transmitted to the department, and they would then pass upon the case upon its merits.

About the 3d of January, 1873, the appeal was perfected and filed with the commissioner.

On the 3d of July, 1873, the commissioner rendered his decision upon the merits, rejecting the whole claim, and gave notice thereof.

On the 15th of June, 1875, Henrietta D. Wright, one of the parties against whom one-half of the tax had been levied and collected, transferred her claim to the plaintiff.

On the same day a summons was delivered to the sheriff of New York to serve on defendant.

On the 24th of June, 1875, the summons was actually served on defendant. The action was originally brought in the State court, but was removed into the Circuit Court of the United States, upon proceedings had under the statute.

Upon these facts the court decided, as matter of law, that the tax and penalty were properly assessed and collected, and that the plaintiff ought not to recover.

The first and principal question in the case is whether the devolution of the property to the children of Henrietta Wright on her death in September, 1865, was a "succession," within the meaning of sect. 127 of the Internal Revenue Act then in force. 13 Stat. 287. The language of that section is as follows: —

"That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession;' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived."

Comparing the terms of the devise of Henry Huntington with the language of this section, we do not see where there is any room for doubt. The will clearly gave to the trustees an estate for the life of Henrietta Wright, with remainder in fee to her children surviving her. At her death, in 1865, those children did "become beneficially entitled in possession,"

and every condition of the law was fulfilled. There was a "past" "disposition of real estate by will," "by reason whereof" the children of Henrietta Wright became "benficially entitled, in possession," to the property devised, "upon the death of [a] person dying after the passage of this act." We think the case is directly within the terms and meaning of the act. Up to the moment of Henrietta Wright's death her children had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her. At her death it came to them as an estate in fee in possession absolute. We cannot imagine a plainer case of devolution within the description of the law.

It is suggested that as the act refers to the acquisition of estates "in possession or expectancy," it cannot mean to embrace estates which had already accrued as estates "in expectancy" before the act was passed. But such an implication cannot be allowed to prevail against the express words of the act, which include all estates to which a person should become beneficially entitled upon the death of any person dying after the passage of the act. In the present case, the children of Henrietta Wright first became "beneficially entitled" to the property in question at their mother's death. They then became "beneficially entitled in possession."

It is also suggested that the case is more aptly described in sect. 128 of that act, which is as follows: —

"That where any real estate shall, at or after the passage of this act, be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase or benefit accruing to any person upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession accruing to the person then entitled beneficially to the real estate or income thereof."

We do not assent to this view. This section is evidently intended to meet the cases of estates burdened by determinable incumbrances, such as rent-charges, leases for years, and qualified interests, which do not suspend the taking effect of the estate in the land, but only subject it to some burden. Where,

however, a remainder is dependent upon a life-estate in the land, it does not take effect as an estate in possession until the life-estate is determined. Till then, it is a mere expectancy. The present case is one of this kind, and we think clearly comes within the description of sect. 127.

Another point made by the plaintiff against the assessment relates to the fifty per cent added to the amount of the succession tax, and exacted by way of penalty for refusing to make a return as required by the statute. This penalty we think was erroneously imposed. The assessor evidently thought that he was authorized to impose the penalty prescribed by the fourteenth section of the act of 1864 (as amended by the act of July 13, 1866), which was, it is true, a penalty of fifty per cent of the tax for refusal or neglect to make a list or return. But an inspection of that section and of the context to which it belongs shows that it related to the annual and monthly lists and returns to be made by parties taxable under the law. So sect. 118 (as amended by the act of March 2, 1867), which also imposed a penalty of fifty per cent for such neglect and refusal, and was relied on by the court below, related only to the income tax. But the penalty for failing to return and give notice of a succession tax is provided for in a distinct section, to wit, sect. 148 of the act of 1864 (as amended by the act of 1866), which is found in immediate collocation with the sections relating to the succession tax. This section declares that if any person required to give such notice [of a succession] should wilfully neglect to do so within the time required by law, he should be liable to pay to the United States a sum equal to ten per cent upon the amount of tax payable by him. This is the specific penalty provided for the special case, and necessarily excludes any other. We are satisfied, therefore, that the penalty of fifty per cent which was actually imposed was wrong, and ought not to have been exacted. There is, therefore, no doubt of the plaintiff's right to recover the amount of this penalty, if, when paid, the protest against its exaction was sufficient.

On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that

the party interested should give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto. Act of June 30, 1864, sect. 14; 13 Stat. 214; Rev. Stat., sect. 2931; *Westray* v. *United States*, 18 Wall. 322; *Barney, Collector*, v. *Watson et al.*, 92 U. S. 449; *Davies* v. *Arthur*, 96 id. 148. No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment will be deemed voluntary. *City of Philadelphia* v. *The Collector*, 5 Wall. 720; *The Collector* v. *Hubbard*, 12 id. 1. But whilst a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty was made under protest, which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary. It is apparent from the findings, it is true, that the objection of the parties was particularly made against the legality of the tax, and not against the penalty as distinct therefrom. But, of course, the objection included the penalty as well as the tax; and as the latter was clearly illegal, we think that the plaintiff should have had judgment for the amount thereof, unless barred by the Statute of Limitations.

We think that the defence of the Statute of Limitations cannot be maintained. Under the nineteenth section of the act of July 13, 1866 (14 Stat. 152), no suit could be maintained for the recovery of a tax illegally collected until appeal should have been duly made to the Commissioner of Internal Revenue, and his decision had thereon. The act contained other provisions not material to this case. In July, 1867, when the tax was paid, there was no statutory limitation of time for presenting claims for remission of taxes to the Commissioner of Internal Revenue.

On the 6th of June, 1872, an act was passed, by the forty-fourth section of which it was provided that all suits for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, should be brought within two years

next after the cause of action accrued, and not after; and all claims for refunding any internal tax or penalty should be presented to the commissioner within two years next after the cause of action accrued, and not after: *Provided*, that actions for claims which had accrued prior to the passage of the act should be commenced in the courts or presented to the commissioner within one year from the date of such passage: *And provided further*, that where a claim should be pending before the commissioner, the claimant might bring his action within one year after such decision, and not after. 17 Stat. 257. When this act was passed, the claim in the present case had not been formally presented to the commissioner, and so did not come within the last proviso; but, for the purpose of presentation to the commissioner, it was embraced in the first proviso. The parties, therefore, had by the act one year to present their claim to the commissioner; and it was thus presented on the third day of January, 1873, within the time allowed for that purpose.

The commissioner rendered his decision on the third day of July, 1873, and then, for the first time, the parties had a right to bring suit against the collector. Then their cause of action first accrued against him. It is manifest, therefore, that the cause of action against the collector was not embraced within either the first or the second proviso of the section just cited; and that it stood upon the primary enactment of that section, requiring that suit should be brought within two years next after the cause of action accrued. This would give the plaintiff until the 3d of July, 1875, to bring his action.

Thus the matter stood when the Revised Statutes went into effect on the 22d of June, 1874, and there is nothing in them to change the plaintiff's right. The forty-fourth section of the act of 1872 is substantially re-enacted in sect. 3227 of the Revised Statutes, which contains no modifications of phraseology that affect the present case. And as it appears from the findings of the court that this suit was commenced by delivery of the summons to the sheriff on the 15th of June, 1875, it is apparent that the defence of the Statute of Limitations cannot be maintained.

The judgment of the Circuit Court will be reversed, and the

case remanded with instructions to enter judgment in favor of the plaintiff for the amount of the penalties exacted from the plaintiff and Henrietta H. Wright, with interest and costs; and it is

So ordered.

PEOPLE'S BANK v. NATIONAL BANK.

A. made his promissory note to his own order, duly indorsed it to the order of B., and delivered it to a national bank. The latter negotiated it to B., and applied the proceeds thereof to the cancellation of a prior debt of A. With the knowledge and consent of the president and cashier, who were also directors, but without any notice to or authority from the board, C., one of the directors and vice-president of the bank, guaranteed, at the time of the transaction, the payment of the note at maturity by an indorsement thereon to that effect in the name and on behalf of the bank. The note was duly protested for non-payment, and the bank notified thereof. B. brought this action against the bank. *Held*, 1. That the bank was not prohibited by law from guaranteeing the payment of the note. 2. That it is to be presumed that C. had rightfully the power he assumed to exercise, and the bank is estopped to deny it. 3. That the bank by its retention and enjoyment of the proceeds of the note, rendered the act of C. as binding as if it had been expressly authorized.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Charles W. Thomas for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case was submitted to the court without the intervention of a jury. The court found the facts and gave judgment for the defendant. The plaintiff thereupon sued out this writ of error and brought the case here for review. The act of Congress regulating the procedure adopted seems to have been carefully complied with.

The People's Bank of Belleville, plaintiff, and the Manufacturers' National Bank of Chicago, defendant, in the court below, are respectively the plaintiff and the defendant in error here.

For convenience, we shall speak of them in this opinion by their former designations.

The facts lie within a narrow compass, and there is no controversy about any of them.

On the 8th of August, 1873, Henry E. Picket made his ten promissory notes of that date, each for $5,000, all payable one year from date to his own order, indorsed by him, and bearing interest at the rate of ten per cent, payable semi-annually. Eight of these notes are described in the plaintiff's declaration. Picket delivered the notes to the defendant to be negotiated to the plaintiff, pursuant to a prior agreement between him and the defendant, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant. On the 8th of August, 1873, M. D. Buchanan, vice-president, and one of the directors of the defendant, with the knowledge and consent of the president and cashier of the defendant, who were also directors, but without any authority from the board of directors as a board, or of a majority of them individually, or any notification to the board of directors as a board, transmitted the notes to the plaintiff with a letter, in which occurs the following language: "In accordance with your telegram I herewith hand you ten notes of $5,000 each, &c. . . . We debit your account $50,000. . . . This bank hereby guarantees the payment of the principal sum and interest of said notes." This letter was written below one of defendant's letter-heads, and signed "M. D. Buchanan, vice-president." The notes were also indorsed, "Pay to the order of the People's Bank of Belleville. Henry E. Picket;" and below, "This bank hereby guarantees the payment of this note, principal and interest, at maturity. M. D. Buchanan, Vice-President Manufacturers' National Bank of Chicago." The defendant was the plaintiff's correspondent at Chicago, and the plaintiff's account with the defendant was debited with $50,000 on account of the notes. At the same time, Picket's paper in the defendant's hands was cancelled to the same amount. All the notes were protested at maturity for non-payment, and due notice was given to the defendant. Nothing has been paid on either of the notes. Besides a special count in the declaration upon the guaranty of each of

the eight notes involved in this suit, there was a common count for money had and received.

The case was submitted in this court without an oral argument. The opinion of the learned judge who decided the case in the Circuit Court is not in the record, and no brief has been submitted on behalf of the defendant. A few remarks will suffice to give our view of the law touching the rights of the parties.

The National Banking Act (Rev. Stat. 999, sect. 5136) gives to every bank created under it the right "to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt*, by receiving deposits," &c. Nothing in the act explains or qualifies the terms italicised. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

The doctrine of *ultra vires* has no application in cases like this. *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. Wharton, Agency, sect. 89; Bigelow, Estoppel, 423; *Railroad Company* v. *Howard*, 7 Wall.

392; *Kelsey* v. *The National Bank of Crawford County*, 69 Pa. St. 426; *Steamboat Company* v. *McCutchen & Collins*, 18 id. 18.

A different result would be a reproach to our jurisprudence.

Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count, is a point which we do not find it necessary to consider. See *United States* v. *State Bank*, 96 U. S. 33.

The judgment of the Circuit Court will be reversed, and the case will be remanded with directions to enter a judgment in favor of the plaintiff in error; and it is

So ordered.

AYERS v. CHICAGO.

1. The order of the Circuit Court remanding a cause to the State court whence it was removed is reviewable here.
2. *Removal Cases* (100 U. S. 457) cited and approved.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Melville W. Fuller for the appellant.

Mr. W. C. Goudy, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 27th of December, 1873, David A. Gage and Eliza M., his wife, citizens of Illinois, conveyed to George Taylor, also a citizen of Illinois, a large quantity of real estate in Cook County, Illinois, in trust to secure the city of Chicago, an Illinois municipal corporation, against loss by reason of the indebtedness of Gage as treasurer of the city. The trustee was authorized to take possession of and manage the property, collect the income, pay taxes, &c., and, under the direction and with the concurrence of the comptroller of the city, sell and

convey the property as soon as it could be done to the interest of all concerned, paying the proceeds into the treasury of the city in liquidation, *pro tanto*, of whatever sum shall be found due from Gage, as late treasurer, to the city. If, when the debt was paid, any of the property remained unsold, it was to be reconveyed to Gage. Should the debt not be paid in eight months, the comptroller was authorized to order a peremptory sale, on such terms as to him seemed best. The amount of the debt to the city was not stated in this deed of trust.

On the 20th of October, 1874, the city of Chicago filed a bill in equity in the Superior Court of Cook County against Gage and his wife and Taylor to enforce this trust. In the bill it was alleged that the debt of Gage to the city amounted to something more than $500,000; that more than eight months had elapsed since the execution and delivery of the deed of trust; and that the comptroller of the city had directed Taylor, the trustee, to make a peremptory sale of the property, or so much thereof as was necessary, for cash, but that he had refused to do so. The prayer of the bill was that the amount due from Gage to the city might be determined, and that Taylor might be directed to sell the property to pay the debt.

On the 17th of November, 1874, Gage and his wife answered, admitting the execution of the trust-deed, but denying "that there was any indebtedness due from said David A. Gage to the said city, which it was his duty to pay over to his successor," and denying "that said Gage neglected, failed, or refused so to do." To this answer a replication was filed December 22, and, December 30, Taylor answered, admitting all the allegations of the bill except as to the amount due the city, and declaring his willingness to proceed with the execution of the trust as soon as the amount of the debt was ascertained. April 2, Gage moved the court for a continuance of the cause on his affidavit showing the absence of a material witness, by whom he expected to prove his defence against the account as made out by the city.

On the 5th of April, 1875, while this motion for a continuance remained undisposed of, William T. Ayers, a citizen of Alabama, executor of the will of Charles P. Gage, also at his death a citizen of Alabama, obtained a judgment in the Cir-

cuit Court of the United States for the Northern District of Illinois against David A. Gage for $3,065.92, and on the 8th of the same month filed a petition in the State court setting forth that he, as a judgment creditor of David A. Gage, claimed a lien on the property included in the trust-deed, and asking that he might be made a party defendant to the suit pending in that court, with leave to answer. The prayer of this petition was granted, and at once Ayers filed an answer setting up his judgment and averring that the trust-deed was void for want of consideration, and further, that even if found to be valid, there was but a small amount of the debt it was intended to secure still unpaid, and that there was enough of the trust property to pay his judgment after the claim of the city was satisfied. On the same day he filed a cross-bill, which was in the nature of a creditor's bill, to subject the trust property to pay his judgment. In this bill he alleged that there was nothing due from Gage to the city, and set forth with much particularity the defences which Gage had against the claim made by the city. As soon as these pleadings were filed he presented his petition, accompanied by a sufficient bond, for the removal of the suit to the Circuit Court of the United States for the Northern District of Illinois, alleging for cause that he was a citizen of the State of Alabama, and all the other parties were citizens of Illinois; "that in the said original bill there is a controversy which is wholly between the said complainants and your petitioner, and which can be fully determined as between them;" and that, as to the cross-bill, "the controversy therein is wholly between citizens of different States." The State court ordered the cause transferred, and on the 1st of May Ayers filed a transcript of the record in the Circuit Court, and had the suit docketed there. Afterwards the parties appeared, and on motion of the city the cause was remanded to the State court. From that order Ayers appealed to this court. After the appeal was docketed the city moved to dismiss because the order remanding the cause was not one from which an appeal is allowed, and because the order was not on the merits of the cause, nor a final order, judgment, or decree from which an appeal lies. This motion was submitted with the case on its merits.

There is no doubt of our jurisdiction. Sect. 5 of the act of 1875 (18 Stat., part 3, 472) is as follows: —

"That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case, cognizable or removable under this act; the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

The order appealed from in this case comes directly within the last clause of this section. It follows that the motion to dismiss must be overruled.

The original bill and cross-bill constitute one suit. *Ayres* v. *Carver*, 17 How. 591; *Ex parte Railroad Company*, 95 U. S. 221. A cross-bill, too, must grow out of the original suit. It cannot bring in new and distinct matters. It is "a proceeding to procure a complete determination of a matter already in litigation." 2 Dan. Ch. Pr. 1549, and note 2.

Ayers was permitted to make himself a party because he claimed to have acquired a lien on the trust property pending the suit. He was allowed to take part in a controversy then existing between Gage and the city. He has no dispute with Gage; neither has he any separately with the city. The most that can be said is that he and Gage have a controversy with the city as to its lien on the property, and that Gage, who is on the same side of that controversy with him, is a citizen of the same State with the city. Such being the case, the suit was not removable under the rule settled in *Removal Cases*, 100 U. S. 457.

The order of the Circuit Court remanding the cause will be affirmed; and it is

So ordered.

STEAM-ENGINE COMPANY v. HUBBARD.

A statute of Connecticut enacts that the president and secretary of each corporation organized thereunder shall annually make a certificate showing the condition of the affairs of the corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, setting forth the amount of capital actually paid in, the cash value of its credits, the amount of its debts, the name and number of shares of each stockholder, and deposit it, on or before the fifteenth day of February or August, with the town clerk of the town in which the corporation transacts its business. It also provides that if such president or secretary shall intentionally neglect or refuse to comply with said provisions, and to perform the duty required of them respectively, the persons so neglecting or refusing shall be jointly and severally liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal. In an action by a creditor of such corporation against its president, — *Held*, 1. That the statute is penal, and must be strictly construed. 2. That the defendant is not liable, if the debt was contracted by the corporation before, although it may remain unpaid during, the period when he neglected or refused to comply with the requirements of the statute.

ERROR to the Circuit Court of the United States for the District of Connecticut.

This is an action by the Providence Steam-Engine Company, a creditor of the Odorless Rubber Company, a joint-stock corporation organized under the laws of Connecticut, to recover from Charles Hubbard, president of the latter company, the amount due by it to the plaintiff.

The remaining facts, and the statute of Connecticut under which the action is brought, are set forth in the opinion of the court.

Mr. Charles E. Perkins for the plaintiff in error.

Mr. A. P. Hyde, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Statutory regulations were enacted by the State to enable the business public to ascertain the pecuniary standing of joint-stock corporations, and for that purpose it was made the duty of the president and secretary of every such corporation annually to make a certificate showing the condition of the affairs of the corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of

making such certificate, stating the amount of paid capital, the cash value of its credits, the amount of its debts, and the name and number of shares of each stockholder, which certificate it is required shall be deposited, on or before the 15th of February or of August, with the town clerk of the town, who shall record the same at full length. Conn. Rev. Stat., sect. 404, p. 172.

Such an officer, whether president or secretary, if he intentionally neglects or refuses to comply with that requirement and perform the duty therein specified, is declared to be liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal. Id., p. 174, sect. 413.

Sufficient appears to show that the Odorless Rubber Company was a joint-stock corporation legally organized in 1870, at Middletown, under the laws of the State. About the time of its organization, to wit, on the 9th of September of that year, C. C. Post was elected president, and it appears that he was twice re-elected at the annual meetings of the stockholders, each held in April of the two succeeding years, and that he continued to hold the office until the 17th of June following his last election, when he resigned. During all the period he was in office there was a secretary.

Neither the president nor the secretary during that period deposited with the town clerk any certificate required to be so filed by the law of the State, except as follows: On the 20th of June, 1871, the president and secretary did deposit such a certificate, showing the condition and assets of the company on the first day of April of that year.

Prior to the 10th of June of the next year the defendant was not even a stockholder of the company, but it appears that he on that day signed the subscription paper exhibited in the record for two hundred shares of new stock of the company, and that eight days later he paid $1,800 towards his subscription. His promise to pay was conditional, that is, he was to pay $6.25 per share whenever cash subscriptions to the amount of $118,000 should be obtained, and the balance in equal monthly instalments of ten per cent each from the date of the subscription, . . . it being understood that none of said subscriptions shall be valid or obligatory until at least said amount

of $118,000 shall have been subscribed and thirty per cent deduction is made in the old stock. Subscriptions to the required amount were obtained, but no evidence was offered to show that the thirty per cent deduction in the old stock was ever made.

Evidence to show that the defendant was ever elected a director is entirely wanting, but it is shown that on the day the old president resigned, the board of directors elected him president of the corporation in the place made vacant by the resignation of his predecessor, and that thereafter he acted as president and stockholder, and that he continued to act as such until the 2d of September in that year, when he resigned said office.

Beyond all doubt, he was during that period the acting president of the corporation, and the bill of exceptions shows that he never made any statement of the condition and assets of the company until the day he resigned his office. Attempt is made by the plaintiffs to show that he was culpably guilty of neglect in that regard; but the bill of exceptions also shows that on that day he, with the secretary, made out in due form and deposited a certificate of the condition and assets of the company as they existed on the first day of July, two weeks subsequent to the day of his election as president of the corporation.

More than three months before the defendant was elected president, the plaintiffs entered into a written agreement with the rubber company, by which they contracted to furnish the company a steam-engine for $5,700, and it appears that they constructed the engine and shipped and delivered it to the purchasers; that the manufacturers subsequently placed it in position and put it in good running order, to the satisfaction of the buyers. Due delivery of the same having been made, the buyers made a cash payment and gave a note for a part of the price, which was never paid, leaving more than $5,000 unpaid when the rubber company was adjudged bankrupt. Payment being refused, the plaintiffs brought this suit against the defendant as president of the rubber company, claiming that the debt was contracted during the period that he was guilty of neglect in not making and depositing the before-described

certificate, and that in consequence of such neglect he is liable for all the debts of such corporation contracted during that period.

Service was made, and the defendant appeared and denied the truth of all the matters alleged in the declaration. Subsequently the parties went to trial, and the verdict and judgment were in favor of the defendant. Exceptions were filed by the plaintiffs, and they sued out a writ of error and removed the cause into this court.

When the plaintiffs rested their case, the defendant requested the court to instruct the jury to return a verdict in his favor; and the bill of exceptions shows that the Circuit Court, being of the opinion that there were no disputed questions of fact, gave the instruction as requested, and that the verdict was in conformity with the instruction. Opposed to that, the plaintiffs insist that the facts proved entitled them to the verdict, and they assign for error the instruction given by the Circuit Court to the jury.

Three principal defences are set up by the defendant, as follows: 1. That he was never legally elected president of the corporation. 2. That the debt was not contracted while he was acting in the capacity of president of the company. 3. That by the proper construction of the State statute he is not liable for the debt due to the plaintiffs, even if the first two points cannot be sustained.

Preliminary to those inquiries, the defendant contends that the statute upon which the action is brought is penal and should be strictly construed; in which proposition the court unhesitatingly concurs. Statutes somewhat similar in character have been passed in several of the States, in all of which States it is held that the statutes are penal, and that for that reason their provisions must receive a strict construction. Take, for example, the statute of New York, which provides that, on failure of the company within twenty days from the 1st of January to make, publish, and file an annual report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made, it has repeatedly been held that the act was penal, and that it could

not be extended by construction to cases not fairly within its language. Hence it was decided that the trustees could not be held liable on account of the failure to publish and file the annual report, unless the debt was contracted during the default, or unless it existed at the time of a subsequent default. *Garrison* v. *Howe*, 17 N. Y. 458; *Boughton* v. *Otis*, 21 id. 261.

Repeated instances have occurred where suit was brought in one State to enforce the statute liability for the debts of a corporation created by the legislature of another State, in all which it is held that the statute is penal, and that it can only be enforced in the State where the statute was passed. *Halsey* v. *McLean*, 12 Allen (Mass.), 438; *Derrickson* v. *Smith*, 3 Dutch. (N. J.) 166; *Sturges* v. *Burton*, 8 Ohio St. 215; *Bank* v. *Price*, 33 Md. 487; *Irwin* v. *McKeon*, 23 Cal. 472.

Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal. *Bird* v. *Hayden*, 1 Robt. (N. Y.) 383; *Moier* v. *Sprague*, 9 R. I. 541.

Suppose that is so, then it is contended by the defendant that the act cannot be enforced against him unless it appears that he was legally elected president, and that he was under legal obligation to perform the duties of that office.

Persons acting publicly as officers of a corporation are ordinarily presumed to be rightfully in office. *Bank of the United States* v. *Dandridge*, 12 Wheat. 64; Angell & Ames, Corp. (9th ed.), sect. 139. Individuals elected and serving as such officers may incur the statute liability for the corporate debts of the company, even though irregularities occurred in their election, if in all other respects the evidence brings them within the category of legal default. *Newcomb* v. *Reed*, 12 Allen (Mass.), 362; *Hagner* v. *Brown*, 36 N. H. 545, 563.

Stockholders elect the directors, and it is claimed by the defendant that he was not legally elected president, because he was not a stockholder, the condition of his subscription having never been fulfilled; but he paid the first instalment, and the evidence reported shows that he acted as a stockholder from the time of his election as president until his resignation. His subscription to the new stock was made before he was elected

president, and the bill of exceptions shows that on the following day he paid the required amount of his subscription.

Power to elect the president is vested in the directors; and the record shows that he was formally elected to the office, and that he acted in that capacity for a month and a half, when he resigned. Beyond controversy, he was the acting president, and in view of the circumstances the court is not inclined to rest the decision of the case upon the ground that the defendant was not, during the period he performed the duties devolved upon the president of the company, legally responsible for the neglect to comply with the requirement of that statute. He acted as president during that period, and, therefore, is liable, if any liability exists, notwithstanding the informality of his election. *Thayer* v. *New England Lithographic Co.*, 108 Mass. 521.

Three months before he was elected president the company contracted with the plaintiffs for a steam-engine, but it was not shipped for delivery to the purchasers until four days after he was elected president and commenced to perform the duties of his office.

Certificates of the kind are required to be deposited with the town clerk on or before the 15th of February or of August, and the provision is that the persons neglecting or refusing to comply with such requirements "shall jointly and severally be liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal." Intentional neglect and refusal create the liability, and the liability extends to the debts contracted by the company during the period of such neglect and refusal, and to no others, which of itself is sufficient to disprove the theory of the plaintiffs that the defendant can in any view be held liable for the default of his predecessor.

Officers of the kind are responsible for the consequences of their own neglect or refusal to comply with the statute requirement while they remain in office, and they continue to be liable for those consequences even after they go out of office; but they are not responsible for the consequences of subsequent defaults committed by their successors, nor are the successors in such offices in any way responsible for the consequences of

such defaults committed by their predecessors in office, for the plain reason that the language of the statute is that the persons so neglecting or refusing . . . shall be liable in an action founded on the statute for all debts of the corporation contracted during the period of such neglect or refusal. *Boughton* v. *Otis*, 21 N. Y. 261.

Much aid in construing the statute in question is not required, as the language employed by the legislature speaks its own construction; but if more be needed, it will be found in another decision of the same tribunal as that just cited. *Quarry* v. *Bliss*, 27 id. 277.

Statutes of the kind are passed for the benefit of creditors, and their reliance always is upon the officers who are such when they give the credit, and not upon persons who had ceased to be officers, or who might subsequently become such when those in office should go out.

Three things must concur in order that it can be held that the defendant is liable: 1. That he was president of the corporation. 2. That he intentionally neglected or refused to deposit the described certificate, as required by the statute. 3. That the debt was contracted during the period of such neglect or refusal.

Where all these things concur, the president is liable, not for all the debts of the corporation, but for all such as were contracted while he was guilty of such default. If he was not the president at the time of the default, or if the debt was contracted before he was in default, then he is not liable, as the case is not brought within the letter or spirit of the statute. Liability in such a case, as imposed, is in its nature penal, and in order to render such an officer responsible it must appear that he has neglected or refused to do some act which the law made it his duty to perform. *Craw* v. *Easterly*, 4 Lans. (N. Y.) 513, 521; *Bond* v. *Clark*, 6 Allen (Mass.), 361–363; *Harrisburg Bank* v. *Commonwealth*, 26 Pa. St. 451.

Marked differences exist between the provisions of the New York statute and those of the State of Connecticut, the latter being much less stringent than the former. By the New York law the duty of making the annual return is required of the corporation itself, and the penalty for neglect is imposed upon the

trustees who are intrusted with the management of its affairs. Consequently it is a corporate duty, and being such each succeeding board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate under the Connecticut statute is devolved on the president and secretary in terms which show that a new president does not inherit the consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York the trustees, upon default, are made liable for all the outstanding debts of the corporation, whenever contracted, but in Connecticut the president and secretary are liable only for debts contracted during the period of such neglect or refusal.

Prior to his election the president, as such, had no duty to perform in respect to such a certificate, which is a self-evident proposition, and it is equally clear that his duty in that regard ceased when he ceased to be president of the corporation. Certificates of the kind are required to be made and deposited with the town clerk on or before the 15th of February or of August, as explicitly provided by the statute. On the 15th of February of that year his predecessor was in office, and of course the defendant was under no obligation to deposit any such certificate on that day, nor was he in any manner in default because his predecessor did not perform that duty. Argument to show that he could not make and deposit such a certificate before he was elected is unnecessary, as such a proposition would be absurd, from which it follows that he was not under any legal obligation to perform such a service until the 15th of August of the same year, it appearing that his election as president took place less than two months prior to that time.

Concede that it became his duty as president to make and deposit such a certificate with the town clerk on the 15th of August next after his election, still it by no means follows that the present action can be maintained, as it clearly appears that he was not in default before that time. Proof of default in the defendant without more will not maintain the action, as it

is also incumbent upon the plaintiffs to prove that the debt alleged was contracted during the period of such neglect or refusal. Apply that test to the case exhibited in the record, and it is clear that the defendant is not liable and that the decision of the court below is correct.

When the agreement for the steam-engine was made, the defendant was not president of the corporation, and of course he was not in default at that time, nor was he in default when the engine was delivered and placed in position, because that took place, in any view of the evidence, one month before the 15th of August, when the default of the defendant commenced. Prior to that time the defendant was never in default, and inasmuch as the debt of the plaintiffs was not contracted during the period of his default, he was not liable for that debt. *Garrison* v. *Howe*, 17 N. Y. 458, 462.

Judgment affirmed.

POMPTON *v.* COOPER UNION.

1. The bonds of "the inhabitants of the township of Pompton, in the county of Passaic" and State of New Jersey, for $1,000 each, bearing date Jan. 1, 1870, issued by the commissioners appointed for that township, and reciting that they are issued in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled "An Act to authorize certain townships, towns, and cities to issue bonds and take the bonds of the Montclair Railway Company," are valid in the hands of a *bona fide* purchaser for value before maturity.
2. The act of the legislature, approved March 18, 1867, incorporating that company authorized it to construct a railway from the village of Montclair, in the township of Bloomfield, to the Hudson River, at one or the other of certain designated points, and also to construct a branch thereof in said township, and to "extend the said railway into the townships of Caldwell and Wayne." By the act of April 9, 1868, provision was made for the appointment of commissioners for any township, town, or city "along the routes of the Montclair Railway Company, or at the termini thereof," who, upon the performance of certain precedent conditions, were authorized to issue its bonds, dispose of the same, and invest the proceeds thereof in the bonds of said company. By a supplemental act, approved March 16, 1869, the company was authorized to extend its railway from any point thereon to any point in the township of West Milford, provided that said act should not be construed as extending the operation of said act of 1868 to any township,

town, or city through or to which the said railway was not authorized to be made before the passage of said act of 1869. When the bonds were disposed of by the commissioners no route of the road west of Montclair had been surveyed. A survey which commenced at that village and extended to a point in the southern part of Wayne Township was filed April 6, 1870. Another survey was filed June 9, and in accordance therewith the road was built. It began at the terminus last mentioned, crossed the line between Wayne and Pequannock Townships; then proceeded to the line between Pequannock and Pompton (the latter being a parallelogram), and after traversing Pompton diagonally about two-thirds of its length, crossed its west line into West Milford, and thence proceeded in that township to the boundary line between New Jersey and New York. Thus, though Pompton did not get a terminus on its southwest line, as originally contemplated, it got for the same consideration the length of the road within its territory and the extension beyond its limits. *Held*, 1. That the commissioners being the sole judges upon the question of disposing of the bonds, their decision was conclusive. 2. That the fact that under the act of 1869, Pompton, instead of being a terminal township, became thereafter a township "along the route of the road," cannot affect the previously vested rights of a *bona fide* transferee of the securities. 3. That the act of 1869 was in effect a legislative declaration that the authorized and not the actual routes were those intended by the act of 1868.

ERROR to the Circuit Court of the United States for the District of New Jersey.

The facts are stated in the opinion of the court.

Mr. Frederick T. Frelinghuysen and *Mr. Thomas N. McCarter* for the plaintiffs in error.

Mr. Barker Gummere, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a controversy touching the validity of certain municipal bonds issued by the inhabitants of the township of Pompton, in the county of Passaic, N. J., which came into the hands of The Cooper Union for the Advancement of Science and Art. The latter brought suit on them, and recovered judgment. The case was then removed here. There is no conflict as to the facts. The questions to be considered all involve the effect of the facts as matter of law upon the rights of the parties.

The Montclair Railway Company was incorporated by an act of the legislature of New Jersey, approved March 18, 1867. The sixth section authorized the company to construct a railway from the village of Montclair, in the township of Bloomfield, to the Hudson River, at one or the other of certain

designated points, and also to attach a branch to the main stem in the township named, and "to extend the said railway into the townships of Caldwell and Wayne."

Sect. 1 of an act approved April 9, 1868, provided that on the application in writing of twelve freeholders, residents of any township, town, or city "along the routes of the Montclair Railway Company or at the termini thereof," except the township of Bloomfield, it should be the duty of the circuit judge of the county, within ten days after receiving the application, to appoint three freeholders, residents of such township, town, or city, to be commissioners to carry into effect the provisions of the act. They were to hold their offices five years and until their successors were appointed. The third and fourth sections of the act are also necessary to be considered. Their provisions may be thus summarized and sufficiently presented for the purposes of this opinion. The commissioners were authorized to borrow money, not exceeding in amount twenty per cent of the valuation of the real estate in such township, town, or city, according to the assessment rolls, at a rate of interest not exceeding seven per cent per annum, to be paid half-yearly, and to execute under their hands and seals bonds therefor, in such sums and payable at such times and places as they might deem proper; but no bonds were to be issued or debt contracted until the written consent of those owning at least two-thirds of the real estate of the township, town, or city on the assessment roll, according to the valuation on such roll, should have been obtained. The consent was to state the amount of money to be borrowed, and that the fund was to be invested in the bonds of the railway company. The signatures of those consenting were to be proved by the oath of one or more of the commissioners. The valuation of the property owned and represented was to be proved by the affidavit of the assessor. The consent and affidavit were to be filed in the office of the clerk of the proper locality. The commissioners were authorized to sell the bonds as they might think proper, but not for less than par. The proceeds were to be invested in the bonds of the railway company issued for the purpose of building and equipping the road, and not otherwise. The commissioners were to subscribe for the purchase of bonds to

the amount they were authorized to borrow. By the first section of the supplementary act of March 16, 1869, the railway company was authorized to extend the road from any point upon it to any point in the township of West Milford. By the fourth section it was provided that the operation of the last-named prior act should not be extended to any township, town, or city through or to which the road was *not authorized* to be extended before the passage of this act. On the 6th of July, 1868, the proper previous steps having been taken, the judge appointed the commissioners for Pompton Township. On the 4th of May, 1870, the commissioners issued bonds to the amount of $100,000, all of which subsequently came into the hands of the defendant in error. When the bonds were disposed of by the commissioners, no route of the road west of Montclair had been surveyed, but it was distinctly proved on the trial that the southeast line of Pompton was then the contemplated and intended southwestern terminus. On the 6th of April, 1870, a survey was filed which commenced at that village and extended to a point between Mead's basin and the Pequannock River, in the southern part of Wayne Township. On the following 9th of June another survey was filed, which began at the terminus last mentioned, crossed the line between Wayne and Pequannock Townships; then proceeded to the line between Pequannock and Pompton (the latter being a parallelogram), and after traversing Pompton diagonally about two-thirds of its length, crossed its west line into West Milford, and thence proceeded in that township to the boundary line between New Jersey and New York. This line was finally adopted, and the road was built accordingly. Thus, though Pompton did not get a terminus on its southeast line, as originally contemplated, it got for the same consideration the length of the road within its territory and the extension beyond its limits. The change was obviously beneficial to the township. No ground is disclosed for the slightest imputation of bad faith against any one, touching either the road or the sale of the bonds. It does not appear that the township authorities made the slightest complaint. Doubtless all believed that what was done was best for all concerned.

According to the record the defendant in error is clearly a

bona fide holder of the bonds. Full value was paid for them, and they were taken underdue without knowledge or notice of any infirmity, if there were any, belonging to them. The learned judge who tried the case below so instructed the jury, and properly withdrew the subject from their consideration.

It is objected to the validity of the bonds, —

1. That they could not be competently issued until the route of the road had been surveyed and the termini thus fixed.

2. That no terminus at Pompton was ever so fixed or designated as to be effectual.

3. That, when the route of the road was changed and fixed pursuant to the act amending the charter of the company, the necessary consideration for the bonds became in a vital part impossible or failed, and that the bonds were thereupon void.

These several points may well be grouped and considered together.

The act under which the bonds were issued must be regarded in the light of the circumstances. At the outset, it is material to note that the power of the commissioners was hedged about by checks, limitations, and safeguards, with the most careful elaboration. Yet it is nowhere said or intimated when or under what circumstances the bonds should be sold. In these respects there was no restriction. The discretion of those who were empowered and directed to make the sale was left unfettered. The bonds were to be issued to aid the company to complete the road. Such is the language of the act. Without such help the road might not be begun, or, if begun, might not be finished. After the work was done, assistance would not be needed. Fraud and abandonment of the enterprise were possible as well after the survey was definitely made as before. Such results touching a work in the hands of persons of known good character were not to be anticipated and could hardly occur. The commissioners being constituted the sole judges as to the points mentioned with reference to parting with the bonds, their decision was conclusive. There could be no appeal and no review. It was a matter with which a *bona fide* purchaser had nothing to do. The phrases "along the route" "or at the termini" have a meaning as plain and clear as that

of any other terms the law-makers could have employed. It was expressly declared that the road might go "into" the township of Wayne, — which meant to any part of it, — and it was intended that it should stop at the line between Wayne and Pompton. There the two territories came in contact. The boundary of one was the boundary of the other, and to stop at that line made Pompton one of the termini of the road. This brought the case within the category expressly defined by the statute, and justified the action of the commissioners. That the terminus was potential and contemplated was sufficient. It was not required to be fixed or unalterable. We hold, therefore, that the bonds were rightfully issued. That under the act amending the charter Pompton, instead of being a terminal township, became thereafter a township "along the route" of the road, cannot affect the previously vested rights of a *bona fide* transferee of the securities. It would be a singular result if a larger and better consideration than was contemplated when the bonds were issued should be held to destroy their validity. There was in effect an exchange of obligations between the company and the township, but the motive and object of the latter was the benefit expected to accrue from the road.

There are several things which go strongly to sustain the construction and effect we have given to the act of 1868.

The coupons for the half-yearly interest upon the township bonds, and those for the half-yearly interest upon the railroad bonds belonging to the township, were paid to the respective holders to Nov. 1, 1872, inclusive. Up to that time it does not appear that the validity of the township bonds was questioned by any one. There seems to have been entire acquiescence on the part of all concerned, including the township authorities.

By the fourth section of the act of 1869 the legislature declared in effect that the *authorized* and not the *actual* routes were those intended by the bonding act of 1868.

By the first section of the act of 1874 the office of the commissioners of Pompton Township was abolished, and their duties were devolved upon the township committee. One of those duties was to provide the necessary funds in the ways

prescribed, and to pay the interest upon the bonds involved in this controversy.

In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. 1 Dillon, Mun. Corp., sect. 46; *United States* v. *Babbit*, 1 Black, 55. Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company, — a legislative construction entitled to great respect.

The bonds of the railroad company held by the commissioners are still in the hands of the township. It does not appear that there has been any offer to return them.

In *County of Scotland* v. *Thomas* (94 U. S. 682), the county was authorized to issue bonds in aid of the construction of a railroad authorized to be built by the Alexandria and Bloomfield Railroad Company, a Missouri corporation. Pursuant to law, that company became consolidated with an Iowa corporation, bearing the name of the Iowa and Southern Railway Company, whereby an important elongation of the road originally authorized was secured. The combined corporations took the name of the Missouri, Iowa, and Nebraska Railway Company. The bonds were issued to that company. This court held them to be valid. It was said, in effect, that this conclusion was the result of "a broad and general view" of the facts of the case.

In *County of Callaway* v. *Foster* (93 id. 567), a statute authorized the stock of a railroad company to be subscribed for, and bonds to provide the means of paying for it to be issued and sold "by the county court of any county in which any part of said railroad *may be*." The stock was subscribed and the bonds were issued and sold before the route of the road was surveyed or located. In construing the phrase "*may be*," this court said: "*May be* what? This expression is incomplete, and is to be construed with reference to the subject-matter. If used in a statute where a road already built was the subject-matter, it would refer to the presence or existence there of the

road. . . . But when used in reference to a railroad not yet built, not located or surveyed, and, indeed, not yet organized, it must have quite a different meaning." "Upon any reasonable construction it embraces Callaway, which was *one of the possible sites*, and a site ultimately occupied in fact." The bonds were sustained.

In *County of Ray* v. *Vansyckle* (96 id. 675), the facts were as follows: —

In 1860, Ray County, in Missouri, under authority conferred by a statute, and the sanction of its legal voters, subscribed by its county court for the stock of railroad company A., and agreed to issue its bonds in payment. Under an act passed in 1864, and pursuant to a popular vote of the county, company A. transferred all its rights, privileges, property, and effects to company B. By an agreement between companies B. and C. and the county court, the subscription of the county for the stock of A. was released, and in consideration of the release the county court subscribed for the same amount of the stock of C., and issued its bonds in payment. By this arrangement the county secured increased railroad facilities, and it still held the certificates of stock. There had been no offer to return them. The county paid the interest on its bonds continuously for five years. It then repudiated. It was held by this court, —

1. That B. was entitled to the bonds of the county by reason of the first subscription.

2. That as against a *bona fide* holder it could not be objected that the qualified voters had not assented to the subscription to C.

3. That the tax-payers were concluded by the act of the county court and by their failure to take action, if it could have availed them, to prevent the transfer from one company to the other.

In *County of Schuyler* v. *Thomas* (98 U. S. 169), *County of Callaway* v. *Foster* and *County of Scotland* v. *Thomas* were cited and strongly approved.

The analogies of all these cases to the one in hand are too obvious to need comment.

If any error or wrong was committed in issuing these bonds, it was the act of the agents of the plaintiffs in error.

Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party. *Heurn* v. *Nichols*, 1 Salk. 289; *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

The bonds in question recite on their face that they were issued "*in pursuance* of an act of the legislature of New Jersey, approved April 9, 1868, entitled 'An Act to authorize certain townships, towns, and cities to issue bonds and to take the bonds of the Montclair Railway Company.'"

In *Orleans* v. *Platt* (99 U. S. 676) this court said: "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray* v. *Lardner*, 2 Wall. 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer County* v. *Hacket*, 1 id. 183; *San Antonio* v. *Mehaffy*, 96 U. S. 312; *County of Moultrie* v. *Savings Bank*, 92 id. 631; *Moran* v. *Commissioners of Miami County*, 2 Black, 722; *Knox* v. *Aspinwall*, 21 How. 539; *The Royal British Bank* v. *Turquand*, 6 El. & Bl. 325."

These rules are the settled law of this court, and they are decisive of the case in hand. The constitutional objection was not taken in the court below; but aside from this, we are of opinion that it is without validity. It would be supererogatory to discuss the minor points set forth in the assignment of errors to which we have not specifically adverted. They are all covered and concluded by what we have said.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE BRADLEY dissented.

HATCH v. DANA.

1. Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties; although, by the terms of their subscriptions, the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than thirty per cent of the subscriptions.
2. *Pollard* v. *Bailey* (20 Wall. 520) and *Terry* v. *Tubman* (92 U. S. 156) distinguished from the present case.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

On April 12, 1871, Charles A. Dana recovered a judgment in the Circuit Court of the United States for the Northern District of Illinois, against the Chicago Republican Company, a corporation organized and existing under the laws of the State of Illinois, for the sum of $6,419.17 and costs.

An execution issued upon this judgment was by the marshal of the United States for that district returned *nulla bona*.

Thereupon, on Aug. 23, 1871, Dana, on behalf of himself and all other creditors of the company who might come in and seek relief by and contribute to the expense of the suit, exhibited in the Circuit Court of the United States for the Southern District of Illinois his bill in equity against the company, Hatch, Williams, and other resident stockholders, averring the incorporation of the company in February, 1865, with a capital stock of $500,000, divided into shares of $100 each; that at a meeting of the incorporators, held in Chicago in April, 1865, certain stock subscriptions were made, Hatch and Williams each subscribing for one hundred shares; that a complete organization of the company was effected, and an assessment of twenty per cent declared upon the stock subscribed, the company thereupon commencing business; that eighty per cent of the subscriptions to stock so made still remains unpaid; that in October, 1870, the company so organized sold and transferred all its tangible property, credits, and subscription lists to a corporation of a very similar name, and thereupon

ceased to do business; that the company is wholly insolvent; avers the recovery of the judgment aforesaid, the issue and the return unsatisfied of an execution thereon; that there are no other unpaid creditors than the complainant. It prays that, upon an accounting of the amount unpaid upon the stock subscriptions of the stockholders named as defendants, they may be decreed to pay so much of the balance found unpaid on their respective subscriptions as will be sufficient to pay the ascertained debts of the corporation, including the judgment aforesaid; and for general relief.

The complainant dismissed the bill as to all of the defendants except Hatch and Williams. They, in their answer, admit the incorporation and organization of the company, as alleged in the bill; do not deny that they were of the original stockholders therein to the amount alleged in the bill, but aver that they paid in thirty per cent of the amount subscribed by them; admit the sale of its property in October, 1870, and that since then it has done no business; do not know whether it is indebted to the complainant or any other person, or whether or not it is insolvent; deny the recovery of the said judgment and call for full proof thereof, but admit that, if such judgment was lawfully rendered, it still remains in full force and unsatisfied; aver that about Aug. 1, 1866, the company determined to reduce its capital stock from $500,000 to $200,000, and did so, calling in all existing certificates, and reissuing to the holders thereof new certificates for two-fifths of the amount which they originally held, since which time various transfers of portions of the new or substituted stock have been made, but the respondents do not know to whom or by whom they have been made; state the names of certain persons who, together with the defendants, are holders and owners of portions of the stock; and ask that all said persons be made parties, and that an accounting be had, in conformity with the prayer of the bill.

A replication to the answers was filed.

The facts of the case are set out in the complainant's bill. A decree was rendered Jan. 6, 1879, that the complainant, Charles A. Dana, recover of Hatch and Williams the sum of $9,398.72, being the amount due on that day upon the said

judgment, and that they pay the costs of the suit to be taxed; it being provided, however, that of the sum so decreed to be paid not more than $7,000, together with interest thereon from the date of the decree, at the rate of six per cent per annum, shall be made and collected from either said Hatch or Williams, the said sum of $7,000 being the amount the court finds each of them to owe and be indebted to the Chicago Republican Company.

From this decree Hatch and Williams appealed.

Mr. D. T. Littler for the appellants.

The remedy sought in this case by the complainant is in virtue alone of the general equity jurisdiction of the court in the premises.

A court of equity will never allow a trust to fail on account of the failure or refusal of a trustee to perform his duty. When, therefore, the creditors of a corporation are unable to obtain satisfaction in the ordinary mode, if the stockholders are indebted to the corporation on account of subscriptions made by them to the capital stock, and the board of directors fail or refuse to raise the money to pay such debts by making and enforcing against the members the necessary assessments, a court of equity will interfere, and either compel the directors to perform this duty, or, according to the modern practice, perform it by its own proper officers. The rights of creditors being superior, and partaking somewhat of the character of a lien, equity will regard and work them out by the same means by which the corporation itself should have done so. *Adler* v. *Milwaukee Patent Brick Co.*, 13 Wis. 57; *Ward* v. *Griswoldville Manufacturing Co.*, 16 Conn. 601; *Henry* v. *Vermillion*, 17 Ohio, 187. The court will either compel the board of directors to make an assessment, or it will exercise its power through its own officers and processes to accomplish the same substantial result.

The bill must be filed against all the shareholders, unless some valid excuse is shown for not bringing them in. This must necessarily be so; otherwise the main object of asserting the jurisdiction of equity, the equalizing of the burden of the shareholders, and the preventing of a multiplicity of suits would be defeated. Under such a bill an account will be taken of

the debts and assets of the corporation, of the amount of capital not paid in, and of the amount due from each shareholder. A receiver appointed in a creditor's suit against a corporation cannot maintain a bill in equity against a single shareholder to collect what is unpaid on his subscription. Thompson, Liability of Stockholders, sect. 353; *Wood* v. *Dummer*, 3 Mas. 312; *Hadley* v. *Russell*, 40 N. H. 109; *Erickson* v. *Nismith*, 46 id. 371; *Mann* v. *Pentz*, 3 N. Y. 415; *Pierce* v. *Milwaukee Con. Co.*, 38 Wis. 253; *Adler* v. *Milwaukee Patent Brick Co.*, 13 id. 57; *Coleman* v. *White*, 14 id. 700; *Carpenter* v. *Marine Bank*, id. 705; *Umsted* v. *Buskirk*, 17 Ohio St. 113; Story, Eq. Jur., sect. 1252; *Pollard* v. *Bailey*, 20 Wall. 520; *Terry* v. *Tubman*, 92 U. S. 156.

In 2 Story, Eq. Jur., sect. 1252, it is said: "The property of private corporations is deemed a trust fund, and the creditors may enforce their claims against it into whosesoever hands it may come, as well before as after dissolution, unless it may have come to the hands of a *bona fide* purchaser. Upon the like ground the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid; and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital would in equity be held liable *pro rata* to contribute to the discharge of such debts out of the funds in his own hands. This, however, is a remedy which can be obtained in equity only; for a court of common law is incapable of administering any just relief, since it has no power of bringing all the proper parties before the court, or of ascertaining the full amount of the debts, the mode of contribution, the number of the contributors, or the cross equities and liabilities which may be absolutely required for a proper adjustment of the rights of all parties, as well as of the creditors," citing *Wood* v. *Dummer*, *supra*; *Vose* v. *Grant*, 16 Mass. 9; *Carson* v. *African Company*, 1 Vern. 121.

The unpaid subscriptions for stock in an insolvent corporation constitute a trust fund for the benefit of all creditors of the corporation alike or *pro rata*, and it is not permissible to one creditor to absorb the same to the exclusion of others.

The bill as framed and filed in this cause properly recognizes the above rule. It is in form a general creditor's bill, under which, if opportunity had been afforded by the court, all creditors might have come in and sought relief, subject to the condition of contributing to the expense of the suit. But no such opportunity was afforded them. There was neither a reference for ascertaining them, nor notice to them to come in.

Although the complainant was not bound to hunt up the creditors, it was incumbent upon the court to refer the cause to a master, with directions to cause notice, by publication or otherwise, to be given to all creditors before proceeding to a final decree appropriating the whole fund to complainant.

"The general rule is that a creditor who proceeds in chancery to subject the liability of the shareholders of an insolvent corporation must bring his bill on behalf of all other creditors who may come in and establish their debts according to the course of a court of chancery. Whilst liens and legal priorities are preserved, he does not obtain a preference over other creditors by the filing of such a bill; but the property of the corporation, or the sums due from shareholders in respect of their individual liability, are sequestered for the ratable benefit of all the creditors." 2 Story, Eq. Jur., sect. 1252; *Wood* v. *Dummer, supra; Morgan* v. *New York Railroad Co.*, 10 Paige (N. Y.), 290; *Mann* v. *Pentz*, 3 N. Y. 415; *Masters* v. *Ressis L. Mining Co.*, 2 Sandf. (N. Y.) 801; *Coleman* v. *White*, 14 Wis. 700; *Carpenter* v. *Marine Bank*, id. 705; *Crea* v. *Babcock*, 10 Metc. (Mass.) 525; *Umsted* v. *Buskirk*, 17 Ohio St. 118; *Pollard* v. *Bailey*, 20 Wall. 520; *Terry* v. *Tubman*, 92 U. S. 156.

Mr. E. B. McCagg, contra.

1. Dana's judgment, the insolvency of the company and its withdrawal from business, entitled him to enforce from its delinquent stockholders, for his benefit, the collection of their unpaid stock subscriptions. *Dalton & Morganton Railroad Co.* v. *McDaniel*, 56 Ga. 191; *Henry* v. *V. & A. R. R. Co.*, 17 Ohio, 187; *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380; *Upton, Assignee*, v. *Tribilcock*, 91 U. S. 45; Angell & Ames, Corporations, sect. 602.

2. It was not necessary to make all the delinquent stockholders parties defendant to his bill. *Ogilvie* v. *Knox Insurance Co.*, *supra*; *Bartlett* v. *Drew*, 57 N. Y. 587.

MR. JUSTICE STRONG delivered the opinion of the court.

This bill is an ordinary creditor's bill, the sole object of which is to obtain payment of the complainant's judgment. It is true it is brought on behalf of the complainant and all other creditors of the corporation who might choose to come in and seek relief by it, contributing to the expense of the suit. But no other creditors came in; and it does not appear that there is any other creditor, unless it be one of the stockholders, who was made a defendant, and who filed a cross-bill which he afterwards dismissed. All the stockholders were not made defendants.

The bill was not a bill seeking to wind up the company. It sought simply payment of a debt out of the unpaid stock subscriptions.

That unpaid stock subscriptions are to be regarded as a fund, which the corporation holds for the payment of its debts, is an undeniable proposition. But the appellants insist that a creditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. They insist, also, that by the terms of the subscriptions for stock made by these appellants they were to pay for the shares set opposite their names respectively, "as called for by the said company;" that the company made no calls for more than thirty per cent; that, therefore, this company could not recover the seventy per cent unpaid without making a previous call; and that a court of equity will not enforce the contract differently from what was contemplated in the subscription.

These positions, we think, are not supported by the authorities, — certainly not by the more modern ones, — nor are they in harmony with sound reason, when considered with reference to the facts of this case. The liability of a subscriber for the capital stock of a company is several, and not joint. By his

subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes.

In *Ogilvie* v. *Knox Insurance Company* (22 How. 380) the question was considered. That was a case in which several judgment creditors of a corporation had brought a creditor's bill against it and thirty-six subscribers to its capital stock. The bill alleged that the complainants had recovered judgments against the company, upon which executions had been issued and returned "no property;" that the other defendants had severally subscribed for its stock; and that the subscriptions remained unpaid, payment not having been enforced by the company. The prayer of the bill was that these other defendants might be decreed to pay their subscriptions, and that the judgments might be satisfied out of the sum paid. It was objected, as here, that the bill was defective for want of proper parties; but the court held the objection untenable. In delivering the opinion of the court, Grier, J., said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their

demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, corporators, or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In that way all the other stockholders or debtors may be made to contribute." The court, therefore, directed a decree against the respondents severally for such amounts as appeared to be due and unpaid by each of them for their shares of the capital stock.

This case is directly in point, and it does not stand alone. In *Bartlett* v. *Drew* (57 N. Y. 587), it was ruled that when the property of a corporation had been divided amongst its stockholders before all its debts had been paid, a judgment creditor, after the return of an execution unsatisfied, might maintain an action, in the nature of a creditor's bill, against a stockholder to reach whatsoever was so received by him, and that he was not required to make all the stockholders parties to the action; that he had nothing to do with the equities between the stockholders, unless he chose to intervene to settle them. This is much beyond what the complainant needs in this case. It is enforcing against stockholders in severalty what the corporation could not enforce, without any regard to the equities of one against the others.

So in *Pierce* v. *The Milwaukee Construction Co.* (38 Wis. 253), which was a proceeding analogous to a creditor's bill, and brought to enforce payment to a judgment creditor of the company of unpaid subscriptions to its capital stock, it was ruled that the complaint was not bad because all the stockholders were not made defendants. This, it is true, was a proceeding under a statute, but it was a statute enacting substantially this equity rule.

In *Marsh* v. *Burroughs* (1 Woods, 468), a bill of certain creditors who had recovered judgments against a bank, to

recover from some stockholders who had not paid in full their subscriptions, non-joinder of parties was set up in defence. Mr. Justice Bradley said: "A judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosesoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defence to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money."

The case of *Wood* v. *Dummer* (3 Mas. 308), upon which the appellants largely rely, was not an attempt to reach unpaid stock subscriptions. It was sought to follow the property of a corporation paid over to its shareholders before its debts were paid. But even in that case the bill was sustained, though all the shareholders were not made defendants. Those not sued appear to have been treated only as convenient, not as necessary parties.

The cases of *Pollard* v. *Bailey* (20 Wall. 520) and *Terry* v. *Tubman* (92 U. S. 156) are not in conflict with *Ogilvie* v. *Knox Insurance Company*. They arose under statutory provisions imposing upon the stockholders of banks a liability for the debts of the corporation, "in proportion to their stock held therein." It was this liability beyond the stock subscription which was sought to be enforced, and as it was only a proportional liability, its extent could be ascertained only when the obligation of the other shareholders was taken into consideration. Hence it was ruled that the proper mode of proceeding was by bill in equity in which an account of the debts and stock could be taken and a *pro rata* distribution could be made. Not a hint was given that the latter case was intended to be questioned or qualified. Indeed, *Pollard* v. *Bailey* and *Terry* v. *Tubman* have little analogy to it, or to the case we have now before us. They were both suits at law. The debt due by these appellants to the corporation of which they are members is a fixed and definite one, and it is neither more nor less because other debts may be due to the company from other stockholders.

We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost.

That the appellants are not protected by the fact, if such was the fact, that their subscriptions for stock were payable "as called for by the company," we think is clear. Assuming that such a clause in the subscription meant more than an agreement to pay on demand, and that it contemplated a formal call upon all subscribers to the stock of the company, the subscriptions were still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made, the officers of the company violated their trust, held both for the stockholders and the company. And it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents. But in this case the company went out of business before the complainant obtained his judgment, and it does not appear that since that time it has had any officers who could make the calls. Before that time its president was dead. However this may be, it is well settled that a court of equity may enforce payment of stock subscriptions though there have been no calls for them by the company. In *Henry* v. *Railroad Company* (17 Ohio, 187), a suit brought by a judgment creditor of a corporation to enforce payment by its stockholders of their unpaid subscriptions, for which calls had not been made, it was held that when a company ceases to keep up its organization, and abandons all action under the charter, a proceeding at the instance of the creditor becomes indispensable. It was further said: "When a company, becoming insolvent, as in this case, aban-

dons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." This means, of course, as between the debtor and the creditor of the corporation. After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor.

In the English courts a *mandamus* is sometimes awarded to compel the directors to make the necessary calls. *Queen* v. *The Victoria Park Co.*, 1 Ad. & El. N. S. 544; *Queen* v. *Ledgard*, id. 616; *The King* v. *Katharine Dock Co.*, 4 Barn. & Ad. 360. But this remedy can avail only when there are directors. The remedy in equity is more complete, and it is well recognized. *Ward* v. *The Griswoldville Manufacturing Co.*, 16 Conn. 593. In such cases it is nowhere held, so far as we know, that a formal call must be made before a bill can be filed. Indeed, the filing of the bill is equivalent to a call. Before it is filed, the court has no jurisdiction of the matter. In bankruptcy, an assessment or a call may be made, for the assignee of a bankrupt corporation succeeds to its rights and becomes the legal owner. Not so in equity.

In *The Dalton, &c. Railroad Co.* v. *McDaniel* (56 Ga. 191), a creditor's bill very like the present was filed. It was objected by the stockholders, who were defendants, that it was for the directors of the company and not for the court to call in the stock subscriptions, and that their contract only obligated them to obey a call emanating from the company; but it was ruled that "principle and sound reason accord with authority that equity will grant relief in all such cases."

In view of these considerations we think none of the assignments of error are sustained.

Decree affirmed.

TERRY v. LITTLE.

1. Where a bank charter provides that on the failure of the bank "each stockholder shall be liable and held bound . . . for any sum not exceeding twice the amount of . . . his . . . shares," — *Held*, 1. That a suit in equity by or for all creditors is the appropriate mode of enforcing the liability incurred on such failure. 2. That, were an action at law maintainable by one creditor, the stockholders must be separately sued, as their liability is several.
2. *Pollard* v. *Bailey* (20 Wall. 520) cited and approved.

ERROR to the Circuit Court of the United States for the Western District of North Carolina.

By sect. 4 of the charter of the Merchants' Bank of South Carolina, at Cheraw, it was provided that, in case of the failure of the bank, "each stockholder, copartnership, or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares." It is alleged in the declaration that the bank failed March 1, 1865. The general assets have since been collected and applied to the payment of debts, under the provisions of an act of the legislature of South Carolina, passed March 13, 1869, placing the bank in liquidation. Debts to the amount of several hundred thousand dollars are still unpaid. The capital stock was $400,000, divided into shares of $100 each. Of these shares the defendant Benjamin F. Little owned at the time of the failure one hundred and ten, and John P. Little one hundred and fifty-eight. On the 21st of August, 1875, Terry, the plaintiff, commenced an action at law in the court below, against the defendants jointly, to recover from them, on account of their individual liability as stockholders, $5,440, the amount due him from the bank on its bills which he held. The defendants demurred to the declaration, and among others assigned for cause, in substance, — 1, that the individual liability of the stockholders as created and defined by this charter could not be enforced in an action at law by one creditor for his sole use to the exclusion of others; and, 2, that even if it could, the

defendants cannot be joined in one such action because their liability is not joint but several. The Circuit Court sustained the demurrer and gave judgment for the defendants. This writ of error has been brought to reverse that judgment.

Mr. Harvey Terry for the plaintiff in error.
Mr. Joseph J. Davis, contra.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created. There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation and provide directly or indirectly a remedy for its enforcement. If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund.

The language of the charter is peculiar. The stockholders are not made directly liable to the creditors. They are not in terms obliged to pay the debts, but are "liable and held bound . . . for any sum not exceeding twice the amount of . . . their . . . shares." This, as we think, means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders. Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made applied to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be

enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution. As the liability of the stockholder is not to any individual creditor, but for contribution to a fund, out of which all creditors are to be paid alike, the appropriate remedy is by suit to enforce the contribution, and not by one creditor alone to appropriate to his own use that which belongs to others equally with himself. We think this case comes clearly within the rule laid down in *Pollard* v. *Bailey* (20 Wall. 520), to which we adhere.

The second ground of demurrer is equally fatal. The liability of the stockholders is several and not joint. Each stockholder is bound for his own share and no more. No judgment can be rendered against him for what another should pay. It follows that in an action at law each stockholder must be separately sued. In equity it is different, for there the decree can be moulded to suit the exigencies of the case, and each stockholder can be held liable and proceeded against for what he is bound to pay, and no more. Undoubtedly, under the provisions of some charters, suits at law may be maintained by one creditor against one or more of the stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability. All we decide is that, under this charter, the suit to enforce the liability should be in the nature of a suit in equity, by or for all creditors, and that it cannot be at law by one creditor for himself alone, against two stockholders who are not jointly liable on account of the shares standing in their respective names.

Judgment affirmed.

GAS COMPANY v. PITTSBURGH.

A gas company which contracted, for a valuable consideration, to furnish a city with gas "free of charge," paid thereon the tax imposed by sect. 94 of the Internal Revenue Act of June 30, 1864 (13 Stat. 264), as amended by the act of July 18, 1866. 14 id. 128. *Held*, that the city is not liable to the company for the amount so paid.

ERROR to the Supreme Court of the State of Pennsylvania.

This was a suit brought by the Pittsburgh Gas Company against the city of Pittsburgh, to recover certain moneys paid by the company to the United States.

That company was incorporated by an act of the legislature of Pennsylvania, approved March 16, 1848, the city of Pittsburgh being the owner of six hundred and ninety-eight shares, of the value of fifty dollars each, and having power to elect six of the twelve trustees of said company. A supplement to said act, approved Jan. 31, 1860, provided as follows, viz.: —

"SECT. 7. That whenever the provisions of this act shall have been accepted by the stockholders of said company and the councils of said city corporation, as hereinafter provided, the mayor, aldermen, and citizens of Pittsburgh shall forthwith cease to be stockholders in said company, and all the stock held by the city corporation or standing in its name on the books of the said company shall be surrendered to the company, and the said city corporation shall have no further right to or interest in said stock; but the same shall become a part of the the funds of the company, and be distributed among the stockholders *pro rata*.

"SECT. 8. That the said company shall, at the cost of the city corporation, construct, erect, and keep in order all such public lamps and burners in the streets as the city councils may direct, and shall also furnish all the gas required for consumption in the public street-lamps, market-houses, council-chambers, and public offices of the city, at the following rates, that is to say: Any quantity not exceeding twelve and one-half millions cubic feet of gas annually, free of charge, and any excess over that quantity that may be required annually at a rate not exceeding seventy-five cents for each one thousand cubic feet of gas in such excess. The price of such excess so furnished, together with the cost of con-

structing, erecting, and keeping in order the public lamps and burners in the streets, shall be paid to the company quarterly by the city corporation."

In pursuance of said act the councils of the City of Pittsburgh, on the third day of February, 1860, passed an ordinance as follows: —

"That the provisions of an act of assembly approved the thirty-first day of January, A.D. one thousand eight hundred and sixty, entitled 'A supplement to an act to incorporate the Pittsburgh Gas Company,' approved the sixteenth day of March, A.D. one thousand eight hundred and forty-eight, be and the same are hereby approved and accepted by the councils of said city, and that a copy of this ordinance, properly authenticated by the presidents and clerks of councils, be delivered to the said gas company, and the mayor of the city of Pittsburgh is hereby authorized and instructed to make a proper surrender to the Pittsburgh Gas Company of all interest and ownership of said city in any stock or other property and effects in said gas company. That all ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed."

Pursuant to said act and ordinance, the mayor of said city made and executed a surrender of its stock, which was accepted upon the terms of said act by the company. The latter, during the six months ending Jan. 1, 1870, furnished a large number of feet of gas, including 6,250,000 feet to be furnished free, under said act of assembly and agreement. By the ninety-fourth section of an act of Congress entitled "An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and a supplement thereto, approved July 18, 1866, it was provided as follows, viz.: —

"SECT. 3. Amendment to sect. 94. On gas, illuminating, made of coal, wholly or in part, or any other material, when the product shall not be above two hundred thousand cubic feet per month, a tax of ten cents per one thousand cubic feet; when the product shall be above two and not exceeding five hundred thousand cubic feet per month, a tax of fifteen cents per one thousand cubic feet; when the product shall be above five hundred thousand and not exceeding five millions of cubic feet per month, a tax of twenty

cents per one thousand cubic feet; when the product shall be above five millions, a tax of twenty-five cents per one thousand cubic feet; and the general average of the monthly product for the year preceding the return required by law shall determine the rate of tax herein imposed. And where any gas-works have not been in operation for the next year preceding the return as aforesaid, then the rate shall be determined by the estimated average of the monthly product: *Provided*, that the product required to be returned by law by any gas company shall be understood to be, in addition to the gas consumed by said company or other party, the product charged in the bills actually rendered by the gas company during the month preceding the return; and until the thirtieth day of April, eighteen hundred and sixty-seven, all gas companies whose price is fixed by law are authorized to add the tax herein imposed to the price per thousand feet on gas sold; and all such companies which have heretofore contracted to furnish gas to municipal corporations are, in like manner, and for the same period, authorized to add such tax to such contract price: *Provided, further*, that all gas furnished for lighting street-lamps, or for other purposes, and not measured, and all gas made for and used by any hotel, inn, tavern, and private dwelling-house, shall be subject to tax whatever the amount of product, and may be estimated, and if the returns in any case shall be understated or underestimated, it shall be the duty of the assistant assessor of the district to increase the same as he shall deem just and proper: *And provided, further*, that gas companies located within the corporate limits of any city or town, whether in the same district or otherwise, or so located as to compete with each other, shall pay the rate of tax imposed by law upon the company having the largest production: *And provided, further*, that coal-tar and ammoniacal liquor produced in the manufacture of illuminating gas, and the products of redistillation of coal-tar, and the products of the manufacture of ammoniacal liquor thus produced, shall be exempt from tax."

By a supplement to said act, passed March 2, 1867, sect. 94 of said act of July 18, 1866, was further amended as follows: "By striking out in the paragraph relating to gas the words, 'and until the thirtieth day of April, 1867.'" The city paid the amount of bill for gas and the tax upon all gas furnished up to Jan. 1, 1871, except the amount of tax on 6,250,000 feet of gas which it claimed said gas company had contracted to

furnish free of charge. The tax on said 6,250,000 feet, amounting to $1,562.50, was paid by the gas company to the United States.

The foregoing facts were agreed upon by the parties and submitted to the court in the nature of a special verdict. Judgment was rendered for the defendant. It was affirmed by the Supreme Court of the State, and the company thereupon sued out this writ of error.

Mr. Charles A. Ray for the plaintiff in error.
Mr. George Shiras, Jr., contra.

MR. CHEIF JUSTICE WAITE delivered the opinion of the court.

Sect. 94 of the Internal Revenue Act of 1864 (13 Stat. 264), levying taxes on illuminating gas, to be paid by the manufacturer thereof, as amended in 1866 (14 id. 128), contained the following provision: —

"All gas companies whose price is fixed by law are authorized to add the tax herein imposed to the price per thousand feet on gas sold; and all such companies which have heretofore contracted to furnish gas to municipal corporations are in like manner . . . authorized to add such tax to such contract price."

This, we think, does not make a municipal corporation liable for the tax in a case where a gas company has, for a valuable consideration, contracted to furnish the corporation with gas "free of charge."

Judgment affirmed.

POLLARD v. RAILROAD COMPANY.

1. A judgment in assumpsit, brought by a husband and wife, on a contract by a carrier of passengers to carry her safely, for injuries to her while being carried, is a bar to another action of assumpsit on the same contract, by the husband alone, to recover for the same injuries.
2. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in States where, as in New Jersey, the husband, in such an action, may by statute add claims in his own right to those of his wife.

ERROR to the Circuit Court of the United States for the District of New Jersey.

This was an action of assumpsit by Jerome B. Pollard, a citizen of Illinois, against the New Jersey Railroad and Transportation Company, a general carrier of passengers, for damages sustained by him in consequence of an injury to his wife, Sarah H. Pollard, caused by the negligence of the defendant while she was a passenger on its road, having a ticket from New York to Chicago, purchased for her by her husband.

The defendant, among other defences, pleaded a former recovery, setting out the record of a judgment in assumpsit in a former action in the same court, in which said Pollard and wife were plaintiffs and said company was defendant. The plea then sets out the contract for the transportation of said Sarah, the breach thereof and the judgment thereon, and avers that, before this writ was signed, said judgment was recovered by the said plaintiffs; that the promises and undertakings for the non-performance of which said judgment was recovered are the same promises and undertakings mentioned in the declaration in this action and none other; that said judgment still remains in full force, not having been reversed.

To this plea the plaintiff demurred. The demurrer having been overruled and judgment rendered for the defendant, Pollard sued out this writ of error.

Mr. Albert A. Abbott for the plaintiff in error.

A former recovery concludes the parties only as to the facts necessary to uphold it. It must appear that the claim in the pending action was litigated, or that the party was bound to present it in the former action; and that the matters which it

involves were legitimately within the issue, and necessarily and directly passed upon by the jury. The same evidence must be sufficient to support both actions. *Phillips* v. *Berick*, 16 Johns. (N. Y.) 137; *People* v. *Johnson*, 38 N. Y. 65; *Barwell* v. *Knight*, 51 Barb. (N. Y.) 267; *Royce* v. *Burt*, 42 id. 663; *Slauson* v. *Engelhart*, 34 id. 202; *Manny* v. *Harris*, 2 Johns. (N. Y.) 30; *Stowell* v. *Chamberlain*, 60 N. Y. 272; *Douglass* v. *Ireland*, 73 id. 107.

The damages claimed by the present plaintiff were not claimed, and could not have been recovered, in the former action. *Lewis et ux.* v. *Babcock*, 18 Johns. (N. Y.) 443; *Russell et ux.* v. *Corne*, 1 Salk. 119; *Holmes* v. *Wood*, 2 Wils. 424; *Whitcomb* v. *Barre*, 37 Vt. 148; *Kavanaugh* v. *Janesville*, 24 Wis. 618; *Hooper* v. *Haskell*, 56 Me. 251; 1 Chitty, Pl. 35, 16th Am. ed.

The statute of New Jersey (Nixon's Dig. 4th ed. p. 735) affords no exception to this point. It relates to actions *ex delicto* only. In this connection see *Brockbank* v. *Railroad Company*, 7 H. & N. 834.

A former recovery is binding only upon parties or their privies, who have a mutual or successive relationship to the same right or thing. It concludes the parties only in the character and as to the right in which they sue or are sued. Bigelow, Estoppel (2d ed.), p. 65; *Rathbone* v. *Hooney*, 58 N. Y. 467.

The present plaintiff was a party to the former action, not in his own right, but in the right of his wife; and he was there joined as a party only because of their relationship. They had no joint right to recover for the damages which the present plaintiff alone sustained.

Mr. J. W. Scudder, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

A judgment in an action of assumpsit, brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of assumpsit on the same contract, by the husband alone, to recover for the same injuries. A different rule

prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in States like New Jersey, where by statute the husband may, in such an action, add claims in his own right to those of his wife. Rev. Laws N. J. 851, sect. 22.

Judgment affirmed.

JONES v. CLIFTON.

1. Unless existing claims of creditors are thereby impaired, a voluntary settlement of property made by a husband upon his wife is not invalid.
2. The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of his voluntary transfer of it as a settlement upon her.
3. The intervention of trustees, in order that the property may be held as her separate estate beyond his control or interference, though formerly held to be indispensable, is no longer required.
4. His reservation of a power of revocation or appointment to other uses does not impair the validity or efficiency of the conveyance in transferring the property to her, to hold until such power shall be executed; nor does it tend to create an imputation upon his good faith and honesty in the transaction.
5. Such a power does not, in the event of his bankruptcy, pass to his assignee.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

Mr. Benjamin H. Bristow and *Mr. James A. Beattie* for the appellant.

Mr. Martin Bijur, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit by Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, to set aside two deeds executed by the latter to his wife, and to compel a transfer of the property embraced in them to the complainant. Clifton married in 1870, and was possessed at the time of a large estate. Previously to

his marriage he had taken out three policies of insurance on his life, each for $10,000. Soon after his marriage he took out two additional policies on his life, each for the same amount as the previous ones. In October, 1872, by his deed-poll he conveyed to his wife, in consideration of the love and affection he bore her, to hold as her separate estate, free from his control, use, and benefit, a small parcel of land in the city of Louisville, in the State of Kentucky, and by the same instrument, upon the like consideration, and to be held for the same separate use of his wife, he assigned to her the five policies of insurance on his life. The deed contained a clause reserving to himself the power to revoke the grant and assignment, in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare.

In April, 1873, by another deed-poll he conveyed to his wife, upon like consideration of love and affection, to hold as her separate estate, free from his control, use, or benefit, two other parcels of land; one consisting of a lot in the city of Louisville, Kentucky, and the other his country place in the county of Jefferson, in that State, comprising thirty-eight acres. The instrument contained a reservation of a power of revocation and appointment to other uses similar to that of the first deed, the power of appointment, however, being somewhat fuller, in providing for its execution either by deed or writing, to take effect as a devise under the Statute of Wills in Kentucky.

These deeds were properly acknowledged and recorded in the counties where the real property was situated. At the time of their execution, the grantor was not in any business, and did not intend engaging in any; was worth about $250,000, and owed only a few inconsiderable debts, which were soon afterwards paid. The deeds were made at the urgent solicitation of his wife, who perceived that his habits were those of an indiscreet young man, somewhat inclined to dissipation, and she was naturally desirous of providing against a possible waste of his property.

In 1873, a general financial panic passed over the country; the values of all kinds of property greatly depreciated in the

market, and land in the country could scarcely be disposed of at any price. By the shrinkage in values and losses in the subsequent years of 1874 and 1875, by his being surety for others, and by bad management, his estate was wasted, and he became hopelessly insolvent. In December, 1875, upon his petition, he was adjudged a bankrupt by the District Court of Kentucky. The complainant was subsequently appointed assignee of his effects, and received an assignment of his property. The proved debts against him amounted to $13,000, and his estate in the hands of the assignee was of little value.

The assignee seeks to set aside the deeds upon various grounds, which, however, may be embraced in the following: 1st, That they are void, because made directly to his wife, without the intervention of a trustee, and so passed no interest to her; 2d, That, by the reservation to the grantor of a power of revocation and appointment to other uses, they were designed to hinder and defraud his future creditors, whilst he retained the control and enjoyment of the property; and, 3d, That the power of revocation and appointment were assets which passed to the assignee in bankruptcy, and can be executed by him for the benefit of creditors.

The questions thus presented, though interesting, are not difficult of solution. The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts, as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by Chief Justice Marshall in *Sexton* v. *Wheaton*, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others. In that case the husband had purchased a house and lot within the District of Columbia, and taken the conveyance in the name of his wife, and afterwards made improvements upon the property. Subsequently he became involved in debt, and his creditors, having obtained a judgment against him, filed a bill to subject this property to its payment, contending that the con-

veyance to the wife was fraudulent and void as to them, and praying that if the conveyance were upheld the wife might be compelled to account for the value of the improvements. But the court held, after an extended consideration of the authorities, that as the husband was at the time free from debt, the conveyance was to be deemed a voluntary settlement upon her; and as it was not made with any fraudulent intent, it was valid against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance, it appearing that they had been made before the debts were contracted. 8 Wheat. 229. That case does not differ in principle from the one before us. The husband in this, as in that one, was free from debt when he made the deeds, which were voluntary settlements upon his wife. It cannot make any substantial difference that in the case cited the money of the husband was expended in the purchase of the property, and the conveyance was taken in the name of the wife; and that in the present case the property was owned at the time by the husband, and was transferred directly by him to her. The transaction, in its essential features, would have been the same as now, if the husband had sold his lands and invested the proceeds in other property and taken a conveyance in her name. The circuity of the proceeding would not have altered its character nor affected its validity. In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them, as in the case of a wife, or children, or parents, the only question that can properly be asked is, Does such a disposition of the property deprive others of any existing claim to it? If it does not, no one can complain if the transfer be made matter of public record, and not be designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee, — whether it be by direct conveyance from the husband, or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a

contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required. This has been established in courts of equity, says Story, for more than a century, so "that whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also." Eq. Jur., sect. 1380. And he adds to this observation, that "it will make no difference whether the separate estate be derived from her husband himself or a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice." There is nothing in the circumstances attending the execution of the deeds in this case which should prevent the full application of the doctrine stated for the protection of the wife's interest against the claim of the assignee for the benefit of the creditors of the husband. *Lloyd* v. *Fulton*, 91 U. S. 485.

The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended "to meet the ever-varying interests of family connections." *Riggs* v. *Murray*, 2 Johns. (N. Y.) Ch. 565. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and

imprudence of the settler, such settlements have in many instances been annulled on that ground. Several of them are cited in the very able and learned opinion of the district judge who presided in the Circuit Court when this case was there heard. The law in England, by which property can be kept in the same families for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. Here the absence of the reservation is only a fact to be explained, and is to have more or less weight, according to the circumstances of each case. In the case before us the husband does not appear to have had his attention drawn to the reservation. He desired to have the property settled upon his wife, and he intrusted the preparation of the deed to his counsel. There was clearly no fraudulent intent on his part; no proof of any such intent was produced or stated to be in existence. The only fraud asserted in argument to exist is constructive fraud arising from the reservation in question. But its presence in the deed, as is clear from all the authorities, does not tend to create an imputation upon his good faith and honesty in the transaction. *Huguenin* v. *Baseley*, 14 Ves. 273; *Coutts* v. *Acworth*, Law Rep. 8 Eq. 558; *Wollaston* v. *Tribe*, 9 id. 44; *Everitt* v. *Everitt*, 10 id. 405; *Hall* v. *Hall*, 14 id. 365; *Phillips* v. *Mullings*, Law Rep. 7 Ch. 244; *Hall* v. *Hall*, 8 id. 430; *Toker* v. *Toker*, 3 De G., J. & S. 486.

As is very justly observed in the opinion of the court below, the insertion of the power of revocation and new appointment, so far from proving that the grantor contemplated a fraud upon his future creditors, tends to show the contrary. Should he revoke the settlements, the property would revert to him, and, of course, be liable for his debts; and should he exercise the power of appointment for the benefit of others, the estate appointed would be liable in equity for his debts.

The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the

power in any other person to be thus executed. Nor is the power a chose in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee.

Decree affirmed.

MAY v. SLOAN.

1. The word "trade" in its broadest signification includes not only the business of exchanging commodities by barter, but that of buying and selling for money, or commerce and traffic generally.
2. Where, to effect a settlement of all his indebtedness to B. and C., who each held a mortgage upon his lands and personal property, A. entered into an agreement in writing with them, containing sundry provisions, by one of which C. stipulated "not to interfere with any *bona fide* trades made by A., so far as any of the mortgaged property is concerned, provided the trades have been carried out in good faith and completed," — *Held*, that a sale by A. to B. of a portion of the lands, which was known to C., and evidenced by an instrument under seal, was a trade within the meaning of the agreement.
3. Where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the defendant, where there is no written evidence of such agreement, may, at the hearing, insist on the Statute of Frauds as effectually as if it had been pleaded.
4. Where the record shows that the appellee, who raises the objection that the lands which are the matter in controversy are not of sufficient value to give this court jurisdiction, bought them for $21,000, and by virtue of that purchase claims them here, and the prayer for appeal, which is verified by the affidavit of the appellant, shows that they are worth more than $5,000, — *Held*, that this court has jurisdiction.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The facts are stated in the opinion of the court.

Mr. Samuel Field Phillips for the appellant.
Mr. Charles N. West for the appellee.

Mr. JUSTICE BRADLEY delivered the opinion of the court.

This was a bill in equity filed in the Circuit Court for the Second Judicial Circuit of Florida, by Andrew M. Sloan, against Asa May, to compel the latter to convey to the complainant a certain tract of land situated in Jefferson County, Florida,

known as the Alvin May place, containing about eleven hundred acres; and for an injunction against his attempting to obtain possession of the land pending the suit. The case was removed into the Circuit Court of the United States for the Northern District of Florida, and the appeal is from the decree of that court, rendered in favor of Sloan.

A preliminary point is made as to the jurisdiction of this court, on the ground that it does not appear that the matter in dispute exceeds the value of $5,000. This objection is untenable. It does appear from the record that the appellee, who raises the objection, purchased the land for the price of $21,000; and it is by virtue of that purchase that he claims it in this suit. Then again, the petition of appeal to this court, which is verified by the affidavit of the appellant, distinctly avers that the matter in dispute is a large body of land worth more than $5,000 in value. No attempt is made to controvert this allegation, and we think that it sufficiently appears that the case is within our jurisdiction.

The facts as set forth in the bill and answer, and developed by the proofs, are substantially as follows: —

In 1868, Asa May, the appellant, sold and conveyed to his relative and friend, Alvin May, a plantation in Jefferson County, Florida, called the Asa May place, consisting of about twelve hundred acres of land, for the sum of $14,848 in gold; and received in payment eight sealed notes, payable at intervals of one year, with interest, seven of which were for $2,000 each, and the eighth for the balance. To secure the payment of these notes, Alvin gave to Asa May a mortgage on the property sold, and on two other plantations adjoining, one called the Picolata place, containing six hundred and fifty acres, and the other called the Alvin May place (being the property in question), containing about eleven hundred acres. Various payments were made on this debt, amounting, as Alvin May testified, to from $9,000 to $11,000.

Alvin May, besides the above property, became the ostensible owner of several other plantations in the vicinity, and became indebted to A. M. Sloan & Co., commission merchants in Savannah, for money lent and advanced and supplies furnished, to an amount exceeding $50,000. To secure this indebtedness,

in January, 1872, he gave to Sloan & Co. three notes, one for $16,831.28, one for $18,777.14, and one for $20,696.78, payable respectively on the first days of January, 1873, 1874, and 1875; and executed to Sloan & Co. a mortgage on the same property previously mortgaged to Asa May, and on several other tracts of land, namely, one called the Elbow tract, containing six hundred and sixty acres, one called the Arendell tract, containing over a thousand acres, one called the McCain place, containing about eleven hundred acres; and a small tract of one hundred and fifty acres, called the S. F. May place. Both mortgages embraced all the personal property on the lands mortgaged, or that might thereafter be thereon.

Alvin May being unable to pay this indebtedness, in May, 1873, Asa May and Andrew M. Sloan (who succeeded to the rights of A. M. Sloan & Co.) severally brought suits against him, and recovered simultaneous judgments, upon which executions were duly issued. Asa May's judgment was for $5,782.15; but the whole balance due to him for principal and interest on his mortgage, including the amount of said judgment, was upwards of $13,000. Sloan's judgment was for $13,811.66, being only upon the note given to his firm which had first matured, — the other two notes not being due. Subsequent judgments were obtained by other parties, and executions sued out thereon.

To obviate the necessity of an actual levy on his property, and to save the expense of advertising, Alvin May, in October, 1873, agreed with the sheriff that no part of the property should be removed, that the sale might take place on the first Monday of December, 1873, and that the proceeds should be distributed according to the rights of the creditors. The sale was afterwards postponed to the first Monday of January, 1874. It was understood that the property to be sold would be the three plantations included in Asa May's mortgage and all the personal property, including mules, farming utensils, and crops. It seems that Sloan had a lien for advances on the crop, independent of his execution and mortgage. The reason why the several tracts covered by Sloan's mortgage, and not covered by Asa May's, were not proposed to be sold at the same time does not clearly appear, except that the title to the McCain place had

failed, and the Arendell place, as will be seen, was allowed to be retained by Alvin May free of Sloan's mortgage. The other two tracts, namely, the Elbow tract, and the S. F. May place, may have been reserved for the remaining notes held by Sloan which were not yet due.

On the 13th of December, 1873, Alvin May, the debtor, and Andrew M. Sloan, made the following written agreement: —

"State of Florida, County of Jefferson: Memorandum made and entered into this thirteenth day of December, A.D. 1873, by and between Alvin May and Andrew M. Sloan, relative to the sale of the lands and personal property hereinafter specified.

"The said May, in consideration of one dollar, in hand paid, of twenty-one thousand dollars to be paid by the said Sloan, bargains and sells to the said Sloan the lands owned by him in said county, known as the Lang place, the Gamble eighth, the Harvey forty, and twenty acres belonging to the Gorman eighth, and the Murray land, comprising eleven hundred acres, more or less; also, six mules, one thousand bushels of corn, one four-horse and one two-horse wagon, the said lands comprising the home settlement, the house formerly occupied by the said Alvin May, and the other tenements and improvements thereon. The said May is to give a good title to the same, and the same is to sell in such way as to make the title perfect at sheriff's sale, if necessary, to satisfy the judgments now upon record, or mortgages now existing, and the payments are to be made upon the claims existing against the said May, and in favor of the said Sloan. The said Sloan is to have possession immediately, and the said May is to vacate the houses by the first day of January, or sooner, if possible.

"Witness our hands and seals, this 13th of December, A.D. 1873.

"A. M. SLOAN. [SEAL.]
"ALVIN MAY. [SEAL.]

"Signed, sealed, and delivered in our presence:
"A. DENHAM.
"M. PALMER."

It is conceded that the lands which form the subject of this agreement constituted the Alvin May place, now the subject of controversy, and were included in Asa May's mortgage.

The evidence establishes, we think, that, in pursuance of this agreement, Sloan did take possession of portions of the property

on the 1st of January, 1874, and has ever since continued to occupy the same.

On the 5th of January, the day before the sale was to take place, Asa May, Alvin May, and Andrew M. Sloan had a meeting at the office of Mr. Pasco, an attorney at Waukenah, in the neighborhood of the property, and entered into the following agreement: —

"*Memorandum of Propositions to Alvin May by Asa May and A. M. Sloan, relative to Settlement of Indebtedness.*

"The property subject to the mortgages and execution of the said May and Sloan is to be sold on the first Monday in January, 1874, under the executions against Alvin May. Unless there are other purchasers ready to bid the amount of Asa May's claim, he is to buy in the property for his own use.

"If Asa May buys the property, he agrees that if Alvin May and wife will relinquish all right and title, including her right of dower, to the property sold, that the Arendell plantation shall be given up to Alvin May; that Asa May will pay up or guarantee the payment of the balance due to Arendell's creditors on the Arendell place, the said amount not to exceed $3,000 at the present time; and that the said Asa May and Sloan will make no further claim to the said place, and will permit the title to rest in Alvin May or his wife.

"Asa May and Sloan bind themselves to make no further personal claim upon Alvin May on account of the mortgage and judgment debts of theirs against him; Asa May agrees to let Alvin May have mules of those bought in, and bushels of corn, and pounds of fodder, to enable him to work the Arendell place, the value of the mules to be deducted from the $3,000. Alvin May is to give peaceable possession of the property as soon as possible, so as to enable Asa May to proceed at once to make his arrangements for the coming year.

"Alvin May is to bring up a memorandum of all the property subject to the mortgage and executions against him, early on the morning of the sale, and is to get in as many as possible of the mules sold by him and not paid for, or paid for only in part. The amount of $3,000 embraces the entire amount to be paid by Asa May, whether it is paid on the land, in mules, or in any other manner. Asa May agrees not to interfere with any *bona fide* trades made by Alvin May, so far as any of the mortgaged property

is concerned, provided the trades have been carried out in good faith, and completed.

"Witness our hands and seals, this fifth day of January, A.D. 1874.

"ASA MAY. [SEAL.]
"A. M. SLOAN. [SEAL.]
"ALVIN MAY. [SEAL.]

"Executed in our presence:
"A. DENHAM.
"S. PASCO."

The last clause of this agreement constitutes one of the principal grounds of the present controversy.

On the 6th of January, 1874, sale took place under the executions. Asa May bid off the three tracts of land covered by his mortgage at fifty cents per acre; namely, the Asa May place, the Picolata place, and the Alvin May place; also nine mules, one pony, one mare, three two-horse wagons, one six-horse wagon, one log-cart, a sugar-mill, and a buggy and harness. Sloan bid off the fodder, a four-horse wagon, a cotton-gin, and two sugar-kettles. One Whitfield bid off fifteen hundred bushels of corn, which he afterwards surrendered to Sloan under the latter's plantation lien.

The proceeds of the sale of the lands, mules, plantation implements, &c., amounting to about $3,000, were applied to Asa May's mortgage; and the proceeds of the sale of the corn and fodder, amounting to about $1,260, were applied to Sloan's plantation lien for advances. It does not appear that any money passed; the application of the proceeds of sale was made by simply crediting the amounts. Sloan received the articles which had been sold to him by Alvin May by the agreement of Dec. 13, 1873, though the mules and one of the wagons were bid off by Asa May, who afterwards purchased the mules and the corn and fodder from Sloan. The sheriff executed a deed to Asa May for the real estate in accordance with the sale.

The object of this suit is to compel Asa May to convey to Sloan, the complainant, the Alvin May place according to what he alleges was the agreement and understanding between the parties, and the intent and meaning of the last clause in the agreement of Jan. 5, 1874.

If the case depended upon the parol agreement set up by the complainant, whereby he claims that Asa May bound himself to convey the land to him, no relief could be granted on this bill. The Statute of Frauds would be a complete bar. The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defence as if the Statute of Frauds had been pleaded. Sugden, Vendors and Purchasers, 150, c. 4, sect. 6, par. 5.

This renders it unnecessary to examine minutely the testimony on the question thus put in issue by the parties. Had the complainant succeeded in proving such an agreement, it could not have availed him. But the fact is, that he did not succeed in making such proof. The evidence is conflicting on the subject. The fact being denied in the answer, it would have required evidence tantamount to the testimony of two witnesses to establish it; whilst we have only that of the complainant himself, in which he is contradicted by the defendant and by Alvin May and Pasco, the attorney.

The question must stand, then, on the construction to be given to the written agreement of Jan. 5, 1874, in view of the surrounding circumstances and the acts of the parties. Does the last clause of that agreement by its terms embrace the transaction contained in the contract made by Alvin May and Sloan on the 13th of December, 1873? Was that transaction a "trade" made by Alvin May relating to the mortgaged property, within the meaning of the terms? Was it a "trade" carried out in good faith and completed?

The word "trade," in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally. There is nothing in the manner in which it is used in the clause in question to limit its meaning. Asa May was to buy in the property for his own use. This was the general purport of the agreement. But it was added that "Asa May agrees not to interfere with any *bona fide* trades made by Alvin May, so far as any of the mortgaged property is concerned, provided the trades have been carried out in good faith and completed." Now certainly the agreement of December 13, between Alvin May and Sloan, was a trade,

within the broad meaning of the term. It was a trade relating to a portion of the mortgaged property. It appears to have been made for full consideration and in good faith. Asa May, when put on the stand, although he denied that by the clause in question he intended to confirm or to agree to carry out the agreement of December 13, yet he could not deny that he knew of its existence; and Pasco, the common attorney of the parties, knew all about it, and had it in his possession when the agreement of January 5 was made in his office. It cannot be said, therefore, that it was a secret agreement, withheld from the knowledge of Asa May, or that any fraud or bad faith was practised upon him in relation to it. It was also a completed agreement, so far as it could be completed without the execution sale itself, which was contemplated as part of the means of carrying it out. The title was to be made good in that way if necessary, and it cannot be disputed that it was necessary. The weight of evidence also is, that the sale had been carried into effect by delivery of possession by Alvin May to Sloan. It is true that as to a portion of the place there is conflicting testimony on this point. Asa May, after the sale, worked a portion of it; though it is not disputed that Sloan was in possession of the residue. In this connection the conduct of the parties in relation to the mules and other personal property included in the agreement of December 13 cannot be overlooked. Although bid off by Asa May, by whose mortgage it was covered, yet Sloan's claim to it was respected, and Asa May soon afterwards actually purchased the mules from Sloan.

If we look to the surrounding circumstances existing at the time, it will be difficult to resist the conclusion that the sale by Alvin May to Sloan of the property in question was one of the trades to be respected by Asa May. At the time of the sheriff's sale he had already received some $10,000 from Alvin May on the principal and interest of the purchase-money for the place he had sold him, and there was about $14,000 still due. By the sheriff's sale and the agreement of Jan. 5, 1874, he not only got back the original Asa May place, which was all the property he had ever parted with, but the Picolata place adjoining, containing over six hundred and fifty acres, which is stated in the bill, and is not denied, to be a valuable

tract of land. It is true that he agreed to give Alvin May an additional $3,000; but it must be recollected that he also got a considerable personal property, the full amount of which does not appear, and a release of dower from Alvin's wife. This was Asa May's situation, and the result of the agreement as it affected him, if construed as we have suggested.

Now, what were the circumstances of Sloan's case? His debt was between $50,000 and $60,000. Besides the lands covered by Asa May's mortgage, he had a mortgage on the McCain place of eleven hundred acres, on the Arendell place of a thousand acres, on the Elbow tract containing six hundred and sixty acres, and on the S. F. May place containing one hundred and fifty acres. He also had a lien on the crop. The McCain place failed in the matter of the title; and in the agreement of Jan. 5, 1874, he agreed to give up to Alvin May all claim on the Arendell tract, to release him from all personal obligation, and to allow $21,000 (its full value) for the Alvin May place; leaving still due to him between $30,000 and $40,000, with only the Elbow tract and S. F. May place as security. Now, why should he have given up the Arendell tract, and all personal claim against Alvin May? And why should this be stipulated for in an agreement between him and Alvin May and Asa May? — an agreement which is entitled "Memorandum of propositions to Alvin May by Asa May and A. M. Sloan, relative to settlement of indebtedness." What did he get? What came to him in the transaction? Nothing, — absolutely nothing, unless the clause in question, at the end of the paper, is to be construed as embracing the agreement of December 13, by which he was to have the Alvin May place at $21,000, on account of his claim.

In the light of all these circumstances, it is hard to resist the conclusion that the word "trade" in the agreement of Jan. 5, 1874, was used by the parties in its broadest signification, so as to include any bargain or sale. As such a meaning of the term is admissible, we think that the circumstances and acts of the parties show that it must have been intended. This being conceded, it plainly became the duty of Asa May, after having purchased the property, to convey the land in question to the appellee.

Decree affirmed.

BANK OF AMERICA v. BANKS.

1. Lands in Mississippi belonging to a married woman, which she, at a stipulated rent, leased to her husband, who entered thereon and cultivated them in his own name and for his own benefit, are not, during the term, her plantation, within the meaning of the statute of that State which enacts that all contracts of the husband and wife or either of them for supplies for her plantation may be "enforced, and satisfaction secured out of her separate estate."
2. A contract for such supplies will not bind the separate property of the wife, unless she be the beneficiary of the cultivation, and they in fact are purchased for her account and benefit.
3. A parol lease of lands in Mississippi for one year, made by a woman to her husband, is not invalid.
4. The recital in a deed of trust of her separate estate, executed by her and her husband, that it is given to secure her indebtedness, evidenced by her and his notes, does not estop her from showing that they were given for supplies furnished for a plantation, which he cultivated in his name and for his benefit.
5. In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. W. B. Pittman for the plaintiff in error.

Mr. James R. Chalmers, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Married women, as the code of the State provides, may rent their lands or make any contract for the use of the same, and may loan their money and take securities for its payment, and employ it in trade or business; and the express enactment is that all contracts made by the husband and wife, or by either of them, to obtain supplies for the plantation of the wife, may be enforced and satisfaction secured out of her separate estate. Provision is also made that when a married woman engages in trade or business as a *feme sole* she shall be bound by her contracts made in the course of such trade or business, in the same manner as if she was unmarried. Code (Miss. 1871), sect. 1780.

Sufficient appears to show that Virginia Banks, one of the defendants, is a married woman, and that A. D. Banks, the other defendant, is her husband; that they executed three promissory notes, each for the sum of $2,000, payable to their own order, and that they indorsed the same in blank; and that the Bank of America, the plaintiff, is the lawful holder of the several notes. Payment being refused, the plaintiff instituted the present suit, and prays judgment for the amount against her separate property.

Process having been served, the defendants appeared and pleaded three pleas in answer to the declaration: 1. That they never promised in manner and form as alleged. 2. That they had fully paid and satisfied the notes before the suit was instituted. 3. That said Virginia, when the notes were made and indorsed, was a married woman, and that the same were made and indorsed by her as the surety and accommodation indorser of her husband, for the purpose of enabling him to obtain money to carry on a plantation cultivated by him and not by his wife, and that the notes were not made and indorsed in payment of money and supplies furnished to the wife to enable her to cultivate a plantation belonging to her as her separate property, in accordance with a contract made to that effect with the plaintiff, and that the notes and indorsements as to her are without legal consideration, and that she is not liable to pay the same.

Prepayment was denied by the bank. In its replication to the third plea of the defendants, it avers that the notes described in the declaration were not made and indorsed by the wife as an accommodation surety for the husband, as alleged in the third plea. Instead of that, it alleges that the notes were made and indorsed by her in payment of necessary plantation supplies to enable her to cultivate her separate plantation; that the same were furnished and delivered to her by certain commission merchants; and that the notes were given for the payment of such plantation and family supplies and necessaries for family use as a married woman is allowed by law to purchase on credit and to bind her separate estate therefor.

Leave to amend the declaration and replications was subsequently granted to the plaintiff, and it appears that amended

counts were filed in pursuance of the authority granted; but it is not necessary to reproduce the new pleadings, as they do not vary the material issues between the parties. Continuance followed, when the parties entered into a stipulation to waive a jury, and that the matters of fact, as well as of law, should be tried by the court. Hearing was had, and the findings of the Circuit Court are as follows: 1. That the husband was discharged before the commencement of the suit from all liability upon the notes, as alleged in his plea. 2. That said Virginia was a married woman at the time she executed the notes, and the wife of the other defendant, as averred in defence. 3. That the notes were executed not to secure any existing indebtedness, but as a security for such advances in money and supplies as the parties to whom the notes were delivered might thereafter make upon the order of the husband, for plantation purposes. 4. That the parties to whom the notes were delivered did thereafter make large advances to the husband, in money and supplies, that remain unpaid, of which an amount as large in value as the aggregate of the three notes was forwarded to the parties and used in the cultivation of two plantations owned by the wife and her two children by a former marriage; that the husband was cultivating those two plantations during the year in question, on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. 5. No proof was exhibited that the parties to whom the notes were delivered or the plaintiff knew whether the wife was or was not interested in such plantation enterprise; but the court finds that they did know of her interest in the property of the plantations, and that the whole of the account was kept in the name of one of the plantations, and that it contained many items for supplies furnished for another plantation in the cultivation of which the husband was interested, and other items having no relation to plantation matters. 6. That a deed of trust of one of the plantations was executed by the husband and wife contemporaneously with the making of the notes to secure the payment of the same, in which it is recited that it is made to secure the indebtedness of the wife. Based on these findings, the Circuit Court rendered judgment for the defendants; and

the plaintiff excepted, and sued out the present writ of error. All the facts are found by the court, and the only error assigned is that the court misapplied the law to the facts.

Marriage, by the rules of the common law, gave the husband a freehold tenure in the estates of inheritance in land of the wife, and the right to the rents and profits during their joint lives. During coverture the husband must sue in his own name for any injury to the profits of the land, but for an injury to the inheritance it was required that the wife must join in the action. 2 Kent, Com. (12th ed.) 131.

Money, goods, and personal chattels in possession vested absolutely in the husband, and became his property as completely as property purchased with his own money; and such property never went back to the wife unless given to her by the husband in his lifetime or by his will, and in case of his death it vested in his executors. Choses in action did not vest absolutely in the husband, but he acquired the power to sue for and recover or release or assign the same, and when recovered and reduced to possession, and not otherwise, the money in most cases became absolutely his own.

Husband and wife during coverture were regarded as one person at common law in most respects, from which it followed as a general rule that the wife could neither sue nor be sued without joining her husband. Great changes in the rules of the common law in that regard were made, even before the colonies separated from the parent country. Deeds of indenture in transferring the real property of the wife, with the consent of the husband, were substituted in the place of fine and recovery; and when it became settled that the wife might hold a separate estate, many other exceptions to the rule that she could neither sue nor be sued without joining the husband were sanctioned by judicial authority.

Exceptions almost without number have been admitted by the courts, and many more have been added to the catalogue by legislation, until in some jurisdictions it is difficult to say that there is any thing left of the ancient rule. Questions of the kind in the State of Mississippi depend almost entirely upon statute regulations and the decisions of the State courts in construing those provisions.

Contracts made by the wife at the period mentioned in the declaration, or by the husband with her consent, for family supplies or necessaries, including wearing-apparel of herself and of her children, or for their education, or for buildings on her land or premises and the materials therefor, or for work and labor done for the use, benefit, or improvement of her separate estate, were by statute declared to be binding on her, and that satisfaction might be had for the same out of her separate property. Code 1857, sect. 25, p. 336.

Supplies for the comfort, convenience, and maintenance of the family and the education of her children must be contracted for by the wife, and, if not purchased directly by her but by the husband, they imposed no liability on her separate property, unless the husband had her consent to act. Unlike that, the rule is that supplies for her plantation, or for the repairs or improvement of her separate estate, or for work, labor, and services in cultivating the same, the contracts may be made by husband and wife, or either of them. *Clopton* v. *Matheny*, 48 Miss. 286, 295.

Orders for supplies to her plantation, if filled, bind the separate property of the wife, whether bought by herself or her husband with or without her consent, the rule being in that State that the husband is for that purpose the agent of the wife *in invitum*, and that he is made so by legislative enactment. Code 1871, sect. 1780; id. 1857, 336. Her separate estate is bound for such supplies, even when purchased by the husband without her direction. *Cook* v. *Ligon*, 54 Miss. 368, 373.

Nothing, say the court in that case, will discharge her estate save an express contract that it shall be released, or something equivalent to it. Neither the acceptance of the note of the husband nor the recovery of the judgment on such note will have that effect. Plantation supplies may include money advanced for the purpose of purchasing the same, — farming utensils, working stock, or other things necessary for the cultivation of a farm or plantation, which latter designation must depend upon the usage and custom of agricultural pursuits. *Herman & Co.* v. *Perkins*, 52 id. 813.

Express statutory provision exists in the State that a married woman may rent her lands or make any contract for the use

thereof, and may loan money in her own name, take securities therefor, and employ it in trade or business; and it is equally clear that she may rent her separate estate to her husband as well as to strangers. *Robinson & Stevens* v. *Powell*, Sup. Court Miss., not reported.

Beyond doubt, the two plantations belonged to the wife and her two children by a former marriage, but it is equally certain that the husband cultivated the same, during the year in question, on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. Supplies for the plantation of the wife, whether purchased by her or by the husband, bind her separate estate; and if she had cultivated these two plantations during the year referred to, the plaintiff would be correct, but the finding of the Circuit Court shows conclusively that she did not cultivate either of them during that year. Her authority to lease the premises is not denied, and the finding of the court establishes the fact that she did not cultivate either plantation during the period when these supplies were furnished.

Leased premises cultivated by the husband in his own name and for his own benefit are not plantations of the wife, within the meaning of the section of the statute which enacts that all contracts made by the husband and wife, or by either of them, may be enforced and satisfaction had out of her separate estate. Code 1871, sect. 1780; Code 1857, p. 336.

Nor is the contract in this case one made by the husband with the consent of the wife, which may also be satisfied out of her separate property. Nothing of the kind is pretended; and if it were, it could not be supported for a moment, as the findings of the court do not contain any thing to give such a proposition the least countenance whatever.

Suppose the plantations were leased to the husband and were cultivated by him that season in his own name and for his own benefit, still it is suggested by the plaintiff that neither the party to whom the notes were delivered nor themselves had any knowledge of the lease, or that the husband purchased the supplies without the consent of the wife or authority of law. Even if that be conceded, it will not benefit the plaintiff, as it only shows that it acted improvidently and without due caution, the

settled decision of the courts of the State being that the provision that makes the husband the agent of the wife to purchase plantation supplies for her plantation applies only to those plantations which are cultivated for the wife's account and benefit, and not to those she has leased and which are in the possession and under the control of the tenant. *Grubbs* v. *Collins*, 54 Miss. 485, 489.

Enough appears in the findings of the court to show that the plantations were in the exclusive control of the husband, and that the supplies were procured for the use of his employés, and that they were not plantation supplies for account or benefit of the wife. Neither the words of the statute nor the decisions of the State courts permit such a contract to be enforced against the separate property of the married woman. In order that the contract may bind the separate property of the wife, she must be the beneficiary of the cultivation, and the supplies must in fact have been purchased for her account and benefit. Her plantation, says Simrall, C. J., is the predicate of her power to make the contract, and, he adds, that a false representation that she has such property will not estop her from averring that the fact is otherwise.

Nor does the statute oblige her to pay for property purchased on credit, the rule being that such an obligation cannot be enforced. Contracts made in the purchase of supplies for the cultivation of her own plantation, where the cultivation is on her own account and for her own benefit, may be enforced against her separate property. Previously, says the Chief Justice, the word was used by the law-maker to include all those things required and used by the planter in the production and preparation of the crops for consumption and sale.

If it be said that the family must be supported, and that the term ought to embrace food and raiment for them, the answer to the suggestion is furnished by a subsequent part of the same section, which provides that supplies, necessaries, and conveniences for the family are not necessarily chargeable on the wife's property. She is not liable for such expenses, unless she bargains to be, or unless the husband, with her consent, buys them on her account. *Wright* v. *Walton*, Sup. Court, Miss., not yet reported. Verbal contracts of lease, not exceeding the

term of one year, are valid by the laws of the State. Code 1871, sect. 2892.

Much discussion of the question of estoppel is unnecessary, as it is clear that a married woman cannot, by her own act, enlarge her capacity to convey or bind her separate estate. *Palmer* v. *Cross*, 1 Smed. & M. (Miss.) 46.

Facts recited in an instrument may be controverted by the other party in an action not founded on the same instrument, but wholly collateral to it. Recitals of the kind may be evidence for the party instituting the suit, but they are not conclusive. *Carpenter* v. *Buller*, 8 Mee. & W. 209, 213; Herman, Estoppel, sect. 238; *Lowell* v. *Daniels*, 2 Gray (Mass.), 161, 169; *Champlain* v. *Valentine*, 19 Barb. (N. Y.) 485, 488.

In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of the husband, and therefore cannot be estopped by these recitals. Bigelow, Estoppel, 276; *Jackson* v. *Vanderheyden*, 17 Johns. (N. Y.) 167.

Viewed in the light of these suggestions, it is clear that there is no error in the record. Tyler, Inf. and Cov. 726.

Judgment affirmed.

WATT *v.* STARKE.

1. The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court, and the party submitting it must procure, for the use of the Chancellor, notes of the proceedings at the trial, and of the evidence there given.
2. The evidence and proceedings become then a part of the record, and are subject to review by the appellate court should an appeal from the decree be taken.
3. These rules are not affected by the second section of the act of Feb. 16, 1875 (18 Stat., part 3, p. 315), which provides that in a patent case the Circuit Court, when sitting in equity, may impanel a jury and submit to them such questions of fact as it may deem expedient.
4. *Harmon* v. *Johnson* (94 U. S. 371) reaffirmed.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the court.

Mr. John A. Meredith for the appellant.

Mr. Robert Ould for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises on a bill in equity filed in the court below, setting forth three certain letters-patent granted to the complainant (the appellant here) for improvements in the construction of plows. The principal controversy in the case arose upon the ninth claim of the third patent set out in the bill, which was dated Nov. 26, 1867, and reissued on the seventeenth day of August, 1869. The defendant filed an answer, in which, among other things, he denied that he had infringed the claim in question, and set up certain patents granted to himself in 1860 and 1868, under which he alleged his manufacture of plows had been carried on. Afterwards, by leave of the court, he filed an amended and supplemental answer, in which, among other things, he alleged that the complainant was not the original and first inventor of the improvements specified in the claim relied on; that it was for a particular kind of mould-board, which he alleged had been in public use and on sale in the United States for more than two years before Watt's application for his patent, specifying the names and residence of persons who had so made and used the same; and that others had known and used it before Watt's pretended invention thereof, naming various persons, and stating their residences. The defendant also, in due time, served a notice upon the complainant that he would introduce several witnesses, whose names and residences were stated, for the purpose of proving prior knowledge and use of the improvements named in the patents more than two years before the complainant's application therefor, and of proving that he was not the original and first inventor or discoverer of said improvements. The defendant also filed in the clerk's office of the Circuit Court, long anterior to the trial, several notices naming other persons whom he intended to examine as witnesses, and specifying certain letters-patent which he intended to introduce in

evidence to show that the complainant was not the original and first inventor of the improvement claimed by him, but that the same had been patented or described in a printed publication prior to his supposed invention or discovery thereof.

After the taking of some depositions on the part of the complainant, the court, on the 7th of April, 1876, made an order for the trial of the following issues before a jury at the bar of the court (other issues being also framed, but subsequently abandoned by the complainant): —

First, Whether the complainant, Watt, was the original and first inventor or discoverer of the improvement claimed in said specification nine, or of any material and substantial part thereof.

Secondly, Whether the improvement therein claimed had been in public use or on sale in the United States for more than two years before the said Watt's application for his patent.

Thirdly, Whether said improvement had been patented, or described in some printed publication prior to said Watt's supposed invention or discovery thereof.

The trial of these issues came on in October, 1876, and the jury rendered a verdict in favor of the defendant on each issue. The complainant thereupon moved for a new trial, but the motion was overruled. Thereupon the court, upon the pleadings, proofs, and verdict of the jury, rendered a decree dismissing the bill. From this decree the complainant has appealed; and in support of his appeal produces two bills of exceptions taken by him at the trial before the jury: —

First, To the admission in evidence, on the part of the defendant, of certain patents, without any notice having been served on the complainant or his attorney of an intention to produce the same; such notice only having been filed with the clerk.

Secondly, To certain instructions given to the jury by the court at the request of the defendant.

Although it appears by these bills that the defendant introduced proof tending to show that plows and mould-boards, substantially the same in principle and mode of operation with the mould-board of the plaintiff, had been in common use more than two years before the date of the application of the plaintiff for his original patent, and that the complainant introduced rebutting testimony on the subject, none of this

evidence is contained in the record. The only evidence which the record discloses is the depositions taken by the complainant before the trial of the issues.

We lately held, in the case of *Johnson* v. *Harmon* (94 U. S. 371), that a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial. We are still of that opinion, for the reasons then stated. The court below may have been abundantly satisfied from the evidence taken at the trial that the complainant had no case. The complainant, on his motion for a new trial, might have had the evidence, or the substance of it, stated and made part of the record, and then we could have seen whether the court below had before it sufficient grounds for being satisfied with the conclusions of the jury. This is the proper course in such cases. See 2 Smith, Ch. Pract. c. 9, and especially pp. 84–88. The fact that by virtue of the recent statute, passed Feb. 16, 1875 (18 Stat., part 3, 315, sect. 2), the trial of a feigned issue may be had, in patent cases, at the bar of the court, makes no difference; for it is expressly declared that the verdict of the jury in such cases "shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings." Where a court of chancery suspends proceedings in a cause in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court of law, and a motion for new trial must be made to that court; but when it directs an issue to be tried at law, a motion for a new trial must be made to the Court of Chancery; and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either by having the proceedings and evidence reported with the verdict, or by moving the Chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought

not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken. See Graham, New Trials, by Waterman, vol. iii. p. 1551. In *Bootle* v. *Blundell*, 19 Ves. 500, Lord Eldon said: "If this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of the court of law is sought in such a form, that it is regarded as conclusive, whether the judgment is obtained upon a verdict, or in any other shape; but upon an issue directed, this court reserves to itself the review of all that passes at law; and one principle, on which the motion for a new trial is made here and not to the court of law, is, that this court regards *the judge's report* with a view to determine whether the information collected before the jury, together with that which appears upon the record of this court, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously." And in another case before the same judge, *Barker* v. *Ray* (2 Russ. 75), he said: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."

It is difficult to see how the matter could be made more clear than it is here put by Lord Eldon, whose familiarity with equity practice and pleadings has probably never been sur-

passed. The remarks above quoted have a direct application to this case. The evidence before the jury, on the question of prior use, may have been so overwhelming as to satisfy the court below that no new trial ought to be granted, but that the verdict should stand, whatever might be said as to the technical points raised by the bills of exceptions. That evidence is not before us. It was before the court below, because the trial was had at the bar of that court. It might have been here so as to be considered by us also, had the party who was dissatisfied with the verdict (in this case, the complainant) seen fit to have procured a statement of the evidence from the judge's notes, or in some other proper way. This was for him to do, if he desired to question the verdict or the decree rendered by the court.

The reason of the practice is obvious: the verdict of a jury upon an issue out of chancery is only advisory, and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded, and a decree rendered contrary to it. See, in addition to the cases cited, *Basey* v. *Gallagher*, 20 Wall. 670. If the verdict were conclusive, erroneous rulings at the time, if material, would vitiate it, of course, and render a new trial necessary. But not being conclusive, the Chancellor may be satisfied with the verdict notwithstanding such rulings; or he may think a new trial desirable even if no erroneous rulings be made. But in all cases where the verdict is brought in question, it is necessary that he be made acquainted with what passed at the trial, including as well the evidence given as the rulings of the court, in order that he may exercise his own judgment in the matter. Exceptions to rulings are proper to be taken and noted; for upon a view of the whole case, the mind of the Chancellor may be affected by them; just as it is proper to take and note objections to evidence taken by deposition: but a bill of exceptions, as such, has no proper place in the proceeding. The verdict can only be set aside on a motion for a new trial, based, not on mere errors of the judge, but upon review of the whole case as submitted to the jury.

What took place on the motion for new trial in this case we are not informed by the record. But as the trial was had at

the bar of the court, even though no statement of the proceeding was made up, the court had the benefit of its own notes of the trial, and therefore was cognizant of all that occurred. Had we the same means of knowledge before us, we could then judge whether the court decided properly or not. But we have not these means. We have only bills of exceptions, which are taken, not for use before the court that tries the cause, but for the use of a court of error or appeal; and are generally taken, as they were here, upon the specific rulings of the court of trial, and not upon the entire proceeding. To decide the case upon these bills, therefore, would be to decide it upon a different case from that upon which it was decided by the court below.

Brockett v. *Brockett* (3 How. 691) was an appeal from a decree of the Circuit Court of the District of Columbia. There had been an issue directed, which was tried on the law side of that court. Exceptions were taken at that trial; and it was sought to procure a reversal of the decree upon these exceptions. But this court decided that this could not be done. The court, speaking by Justice McLean, say: "The bills of exceptions are copied into the record, but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court in chancery." This case is directly to the point, that a bill of exceptions is not the proper mode of reviewing the trial of an issue out of chancery.

Had the case been fully presented to us, as the court below had it before it on the motion for a new trial, we do not mean to say that the objections relied on by the appellant might not have been good ground of reversal of the decree. But without that, we cannot say that they are; for, even though they had been well taken, they would not necessarily have been good ground for a new trial. The usual grounds for directing a new trial of an issue, as stated in Smith's Chancery Practice (Phila. ed.), vol. ii. p. 84 (citing *Tatham* v. *Wright*, 2 Russ. & M. 1), are, "1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence is against the verdict; and, 3dly, because of an informality in the evidence." But, as we have before shown, notwithstanding erroneous rulings may have been made, the whole case as presented at the trial may have been such as to show to the Chancellor's satisfaction that no

new trial was necessary. In the case cited by Smith (*Tatham* v. *Wright*), the Master of the Rolls, on the motion for new trial, said: "I have carefully read every word of the report of the learned judge, but have purposely abstained from reading the short-hand writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. . . . I am clearly of opinion that the weight of evidence is in favor of the competence of the testator, and that the jury have come to a sound conclusion on the subject. As this opinion is formed without any reference to the summing up of the learned judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different conclusion, it is not necessary to take any notice of the observations which have been made in that respect." On appeal to the Lord Chancellor, Chief Justice Tindall and Chief Baron Lyndhurst, sitting for the Chancellor (who had been counsel in the cause), took no notice of the instructions given by the judge to the jury; but carefully examined the evidence which had been laid before the jury at the trial, and sustained the verdict, as the Master of the Rolls had done.

We have examined the authorities referred to by the learned counsel of the appellant, but find nothing therein which militates against the views which we have expressed.

The case of *Salter* v. *Hite* (7 Bro. P. C. 189), which is most relied on, only confirms these views. There, notes of the evidence were had, on a motion for a new trial, and the decision, both of the Lord Chancellor and the House of Lords, was based upon a consideration of the whole matter. *Cleeve* v. *Gascoine* (Amb. 323) came before the Chancellor on a motion for a new trial, no bill of exceptions having been taken. A new trial was granted on two grounds: first, because postponement had been refused by the judge, notwithstanding the absence of a material witness for the defendant by means of sudden illness. The materiality of the witness's testimony was shown by a statement of what it had been on a previous trial, in which a contrary verdict had been given. The other ground was a clear misdirection of the judge to the jury. Under these circumstances, the Lord Chancellor deemed the verdict unsat-

isfactory, and directed a new trial to be had. Misdirection of the judge is, undoubtedly, a strong circumstance to be taken into consideration, when the Chancellor has the whole case before him, and the evidence is not so preponderating as to sustain the verdict notwithstanding the instructions. Here the Chancellor had before him sufficient to show that the verdict was taken, not only under a misdirection, but in the absence of very important evidence which ought to have been before the jury. We see nothing here in conflict with what we have said above. The exclusion of material testimony which might have changed the verdict is quite as important to a just conclusion to be formed by the Chancellor, as the preponderance of testimony actually given can be to sustain a verdict open to technical objections. In both cases the question is, whether, in view of all the evidence given, as well as of what has been improperly excluded, the conscience of the Chancellor ought to be satisfied.

In the case of *Watkins* v. *Carlton* (10 Leigh (Va.), 560), the Court of Appeals of Virginia held, as we do, that the whole proceedings in the court of law, upon an issue directed out of chancery for the purpose of ascertaining a particular fact, are part and parcel of the chancery cause; and that the court, if required, must certify any instructions given to the jury; inasmuch as the Chancellor has a right to see the whole proceedings. In that case a bill of exceptions was taken, it is true; but the case was considered as upon a motion for a new trial. One of the issues, whether or not the defendant was a mulatto, had, under the instructions of the judge, been ignored or evaded, and evidence upon it had been excluded. All this was made to appear to the Court of Appeals; and that court very properly reversed the decree. As intimated by us in *Johnson* v. *Harmon*, though a bill of exceptions cannot properly be taken on the trial of a feigned issue out of chancery, yet, if taken, it may be employed as one of the means of bringing before the court, on a motion for a new trial, the proceedings which took place at the trial. This is all that was done in *Watkins* v. *Carlton*.

Brockenbrough v. *Spindle* (17 Gratt. (Va.) 22) was a bill filed to set aside a deed of trust on account of usury in the loan intended to be secured thereby, and the proceedings were regu-

lated by statute, which required that the question of usury should be tried by jury at the bar of the court. Apparently, the verdict of the jury was to be conclusive. In this case a bill of exceptions was taken in which all the evidence given on the trial was set forth; and the Court of Appeals went into a full consideration both of the evidence and of the rulings of the court, and reversed the decree and ordered a new trial, with instructions that if the evidence on the new trial should be substantially the same as on the former trial, the court should instruct the jury, if they believed the evidence, that they ought to find the transaction not to be usurious. In view of the effect given to the verdict by statute in this case, we see nothing in the action of the Court of Appeals in conflict with what has been laid down in this opinion; and we find nothing material to the question in the other cases that have been cited.

Decree affirmed.

LEGGETT v. AVERY.

1. Where, on the surrender of letters-patent, a disclaimer of a part of the inventions described in them is filed by the patentee in the Patent Office, and reissued letters are granted for the remainder, — *Held*, that, if in a second reissue the disclaimed inventions are embraced, he cannot sustain a bill to enjoin the infringement of them.
2. *Quære*, are reissued letters-patent valid, if they contain any thing which the patentee disclaimed, or in the rejection of which he acquiesced, in order to obtain the original letters?

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The facts are sufficiently stated in the opinion of the court.

Mr. M. D. Leggett for the appellants.
Mr. John E. Hatch, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was a bill in equity filed by the appellants against the appellees for an injunction to restrain the latter from infringing certain letters-patent for an improvement in plows, and for an account of profits and an assessment of damages. The letters-

patent were originally granted to one Matthew G. Slemmons on the ninth day of October, 1860, surrendered and reissued on the twenty-second day of June, 1869, extended for seven years from the ninth day of October, 1874, and again surrendered and reissued on the tenth day of November, 1874. One of the defences made by the defendants was, that the last reissue embraced certain claims for alleged inventions, which had been expressly disclaimed by the patentee as a condition of getting the letters extended, and which are the specific claims which the defendants are charged with infringing. The fact on which the defence is based seems to be well founded. In the original letters, granted in 1860, the only thing claimed was, "the arrangement of the two curved shoulder-beams, A, A, a clevis, B, transverse bar, D, m, slotted adjustable handles, E, E, b, and notched and mortised shovels, C, C, e, in the manner and for the purpose described." The specification commences by saying, "My invention consists in the particular arrangement of the several parts in the manner and for the purpose hereinafter described." Of course this was a claim for a combination of a number of particulars, and was a very narrow patent, for no one would infringe it who did not use all the parts in the combination as described. It is not pretended that the defendants have done so.

But in 1869 the patentee surrendered these letters and obtained a reissue, embracing six different claims, which were as follows: —

"1. The two converging beams A A, each one of which has a shovel-standard, A', formed by bending its rear end, substantially as described.

"2. The converging beams A A, connected together and constructed with curved shovel-standards A' A' upon them, substantially as described.

"3. The union of the front ends of plow-beams, which have their rear ends bent to form shovel-standards, by means of a clevis or device by which the team is hitched to the implement, substantially as described.

"4. The converging plow-beams A A, having shovel-standards A' A' formed on them, in combination with handles F F and handle-supporting braces E E, substantially as described.

"5. In combination with the foregoing, the manner, substantially

as described, of adjusting the handles F F, and securing them to the beams at any desired angle.

"6. Constructing of one piece of metal a plow-beam, A, and a curved shovel-standard A', with a shoulder *d* formed on the latter, substantially as described."

The defendants allege that most of these claims were for devices that had long been in public use, and that the patentee never attempted to vindicate his title to them by instituting any suits against those who had used them; and evidence on the subject was introduced which it would be necessary for us to examine, if the case depended on this issue. But early in 1874 the patentee, on behalf of the present complainants and appellants who had purchased the patent, applied for an extension for another seven years. This was opposed by those who were interested in the subject-matter; and the acting commissioner of patents refused to grant the extension unless the patentee would abandon all the claims in the reissued patent of 1869, except the fifth. Thereupon a disclaimer was filed accordingly, and the patent was extended for the fifth claim only, which the defendants have not infringed. This disclaimer was filed on the 5th of October, 1874; and the extension was granted on the ninth of the same month. On the same day, another reissue was applied for, including substantially the claims which had been rejected and disclaimed. The examiner refused to pass the application; but it was persisted in, and finally, on the 10th of November, 1874, the reissue was granted on which the present suit was brought. This reissue contains the following claims: —

"1. Two diverging beams, A A, that have their rear ends bent to form shovel-standards, the said beams being fastened rigidly together, substantially as described, at and springing from the point of attachment for the draft.

"2. Two diverging beams, A A, that have their rear ends bent to form shovel-standards, and their front ends fastened rigidly together and merged into a device, substantially as described, whereby the plow may be attached to the draft.

"3. The combination, substantially as described, with the two plow-beams A A, of the handles F F, and adjustable handle-supporting braces E E."

It is obvious, on inspection, that the first and second of these claims are for substantially the same inventions which were disclaimed before the extension, and are for different inventions from that which was included in and secured by the letters-patent as extended. The court below deemed this, amongst other things, a fatal objection to the validity of the reissued letters-patent. We agree with the Circuit Court. We think it was a manifest error of the commissioner, in the reissue, to allow to the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had thus expressly disclaimed. The pretence that an "error had arisen by inadvertence, accident, or mistake," within the meaning of the patent law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence and the express disclaimer of the patentee. If, in any case, where an applicant for letters-patent, in order to obtain the issue thereof, disclaims a particular invention, or acquiesces in the rejection of a claim thereto, a reissue containing such claim is valid (which we greatly doubt), it certainly cannot be sustained in this case. The allowance of claims once formally abandoned by the applicant, in order to get his letters-patent through, is the occasion of immense frauds against the public. It not unfrequently happens that, after an application has been carefully examined and compared with previous inventions, and after the claims which such an examination renders admissible have been settled with the acquiescence of the applicant, he, or his assignee, when the investigation is forgotten and perhaps new officers have been appointed, comes back to the Patent Office, and, under the pretence of inadvertence and mistake in the first specification, gets inserted into reissued letters all that had been previously rejected. In this manner, without an appeal, he gets the first decision of the office reversed, steals a march on the public, and on those who before opposed his pretensions (if, indeed, the latter have not been silenced by purchase), and procures a valuable monopoly to which he has not the slightest title. We have more than once expressed our disapprobation of this practice. As before remarked, we consider it extremely doubtful whether reissued letters can be sus-

tained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters-patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up on an application for a reissue.

Decree affirmed.

MR. JUSTICE HARLAN did not sit in this case.

SIMMONS v. WAGNER.

1. A tract of public land which has been sold by the proper officer of the United States, and the purchase-money therefor paid, is not subject to entry while the sale continues in force.
2. A party in possession of lands, holding an uncancelled certificate of the register of the land-office within whose district they are situate, showing that full payment has been made for them, was sued in ejectment by the party who subsequently entered them, and obtained a patent therefor. *Held*, that the plaintiff is not entitled to recover.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Mr. A. L. Knapp for the plaintiff in error.

Mr. Charles P. Wise for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was an action of ejectment brought by Simmons, the plaintiff in error, against Wagner, the defendant, to recover the possession of the N. E. fr. ¼ sec. 19, T. 4, N. R. 9 W. of the third principal meridian, Illinois. Simmons claimed title under a patent from the United States, dated April 25, 1871, granting him the lands as the assignee of one Mecke, who entered them at the land-office Jan. 25, 1871. Wagner claimed through a purchase made under the old credit system, April

17, 1816, by one John Lewis, and a paper bearing date July 8, 1829, which purported to be a certificate of full payment of the purchase-money in favor of William Russell.

A trial was had to the court without a jury, and resulted in a judgment for the defendant. There was no special finding of facts, but the evidence is set out in full in a bill of exceptions, which concludes as follows: "The court found the issue joined for the defendant on the ground that the premises in controversy, on the issue of the final certificate to William Russell, ceased to be a part of the public domain, and were not thereafter subject to entry by individuals or sale by the United States, and to which finding the plaintiff then and there excepted."

To justify this conclusion, the court must have found as a fact that the final certificate in question was a genuine document, and issued by the proper officer in the regular course of his official duty. This finding is conclusive on us, for we have many times decided that a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. *The Abbotsford*, 98 U. S. 440, and the cases there cited. We have to consider, then, upon this branch of the case, only the question whether one in possession under such a certificate, without a patent, can successfully defend against an action of ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as part of the public domain.

It is well settled that when lands have once been sold by the United States and the purchase-money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. *Wirth* v. *Branson*, 98 id. 118; *Frisbie* v. *Whitney*, 9 Wall. 187; *Lyttle* v. *The State of Arkansas*, 9 How. 314. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652; *Stark* v. *Starrs*, 6 Wall. 402.

This leads us to the inquiry whether Lewis and his assigns

had, under the facts as found, acquired a vested right in the lands when the entry was made by means of which Simmons got his patent. By the statute under which Lewis made his entry in 1816, it was provided that purchases of public lands might be made on credit, and that when payment of the purchase-money was completed the register of the land-office should give "a certificate of the same to the party, and, on producing to the Secretary of the Treasury the same final certificate, the President of the United States is hereby authorized to grant a patent of the lands to the said purchaser, his heirs or assigns." 2 Stat. 76, sect. 7. It follows, then, that if the final certificate in this case was genuine and valid, as, in effect, it has been found to be, Russell, the assignee of Lewis, had the legal right to demand from the President a patent for the lands described. This, certainly, was a complete segregation of the lands in controversy at that date. The sale to Mecke and patent thereon to Simmons, more than thirty years afterwards, were null and void, and conveyed no title as against Russell and his assigns. It is of no consequence whether the assignees of Russell could get a patent in their own names or not. After the certificate issued the lands were no longer in law a part of the public domain, and the authority of the officers of the government to grant them otherwise than to him, or some person holding his rights, was gone. The question is not whether Wagner, if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons can recover as against him. He is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own. We think it clear, therefore, that the court below was right in giving judgment for defendant on the facts found.

Several exceptions were taken, during the progress of the trial, to rulings on the admissibility of evidence. While errors have been formally assigned on all these exceptions, only a few have been insisted on in the argument. Some have been already disposed of, as the objections were made entirely upon the assumption that nothing short of a superior legal title could defeat the patent which Simmons held. There was some evidence to prove the signatures of the register to the final certificate. That was one of the facts in the case, and the general

finding in favor of the validity of the certificate is equivalent to a finding that its due execution had been proved. The question here is not whether the deeds from Lewis to Russell, without the clerk's certificate as to the official character of the officer before whom the acknowledgment was made, would be sufficient to justify the register of the land-office in issuing his final certificate; but whether, in this action, they were admissible without such certificate to prove the fact that an assignment had been actually made. For aught we know, they were properly certified when presented to the register. Copies from the county records were offered in evidence below, and the records were made in 1816, long before any action was had by the register. It is not claimed that any certificate was necessary to authenticate them for record or to make them admissible as evidence in the cause.

On the whole, we see no error in the record.

Judgment affirmed.

WEST *v.* SMITH.

1. Where an action has been removed from a State court to the Circuit Court, the latter may, in accordance with the State practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts.
2. In an action to recover the balance alleged to be due upon certain yarn spun for, and from time to time delivered to, the defendant, for all of which he had paid, except the last lot, he, by way of recoupment, claimed damages because all the yarn was not of the stipulated size. To prove this, he put in evidence a letter of the plaintiff wherein he, at the instance of the defendant, deducted from one of his bills five cents per pound on a specified quantity, and stated the balance. The plaintiff, being examined, was then asked by his counsel whether he accepted defendant's proposition to make the deduction on that lot because he admitted that the yarn was not according to contract, or to settle a controversy. He answered that it was to avoid a controversy. *Held*, that the answer was properly admitted.

ERROR to the Circuit Court of the United States for the District of Connecticut.

The facts are stated in the opinion of the court.

Mr. C. E. Perkins for the plaintiff in error.
Mr. A. P. Hyde, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Due removal of the suit before the court was made from the State court where it was commenced, into the Circuit Court, in which case it is no longer usual to file new pleadings, the act of Congress providing that the practice, pleadings, and forms and modes of proceeding in common-law actions shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the State within which such Circuit Court is held, any rule of court to the contrary notwithstanding. 17 Stat. 197; Rev. Stats., sect. 914.

Sufficient appears to show that the writ in the practice of the State courts contains the declaration, the command of the same to the sheriff being that he shall summon the defendant to appear and answer to the plaintiff in a certain plea, wherein is set forth the cause of action. Pursuant to that practice, the defendants in this case were summoned to appear in a plea of the case, the declaration containing two counts in assumpsit, — the first being a count for goods sold and delivered, in the sum of $8,000, in two forms; the second being a count for work and labor done and performed, in the sum of $8,000, at the special instance and request of the defendants. Both counts are in the usual form, and the declaration concludes with the usual breach alleging non-payment, to the damage of the plaintiffs in the sum of $10,000. Personal service was made; and the defendants having appeared and removed the cause into the Circuit Court, pleaded the general issue that they never did assume and promise in manner and form as the plaintiffs in their declaration have alleged, and tendered an issue to the country.

Special matter may be given in evidence under the general issue, according to the State practice, if previous notice be given by the defendant or defendants. Such notice was given by the defendants in this case, that they would give in evidence a written agreement, and the extension of the same for one year, which is fully set forth in the transcript. *Profert* of the

instrument was made, and the defendants averred that the supposed promises were made, if ever, in consideration of work and labor done by the plaintiffs in the pretended performance of the stipulations and agreements in said written contract contained, in respect to which the defendants allege that the plaintiffs did not keep and perform their said agreements and obligations, to the damage of the defendants in the sum of $20,000, and greatly exceeding the amount that would be due to the plaintiffs for the alleged labor and work they had performed. What they claim is to set off so much of said damages as may be sufficient to extinguish their indebtedness to the plaintiffs, and to recoup and recover the excess of the $20,000 by a judgment in their favor.

In addition to the notice of such special matter, they also pleaded the Statute of Limitations, which, it seems, would not be admissible under the general issue and notice of special matter.

Leave was asked by the plaintiffs to file two additional special counts; and the court allowed them to file the one called in the transcript the second special count, subject to the objection of the defendants. Preliminary matters being closed, the parties went to trial, and the verdict and judgment were for the plaintiffs in the sum of $7,978.84. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court.

Two errors are assigned in this court, as follows: 1. That the Circuit Court erred in allowing the new count to be filed. 2. That the court erred in admitting parol evidence of the plaintiffs' intention in writing the letter set forth and described in the transcript.

1. Amendments to the declaration under the State statute may be made by the plaintiff to correct any defect, mistake, or informality in the same, not changing the form or ground of the action; and he may insert new counts in his declaration for the same cause of action as that alleged in the original counts. State Stats., Revision 1875, 426.

Authority is also given by the same statute to insert counts in any form of action which might have been originally inserted in the declaration. As quoted, the word "in" before

"which," as found in the published statute, is left out, it being regarded as a misprint, or, if not, that the word "declaration" should follow it, which would give the provision the same meaning as if the word "in" was omitted. Nor is it necessary in this case to construe that provision, as it is clear that the question before the court is controlled by the preceding part of the section, which authorizes the plaintiff to insert new counts in the declaration for the same cause of action as that alleged in the original counts, as well as to correct any defect, mistake, or informality in the declaration, not changing the form or ground of action.

Such amendments to the declaration are allowed in the State courts with great liberality, and it appears that the practice is carried to such an extent as to justify the remark of the court in a case cited for the plaintiffs, that the decisions of other States furnish but little guidance in expounding the meaning of their statute upon the subject. *Nash* v. *Adams*, 24 Conn. 33–38.

Their original statute was passed at a very early period, and has been several times amended so as to enlarge and extend the power of the court, and the course of the decisions in the courts has been in the same direction, so as to further the beneficial purpose intended by it, which was to prevent the plaintiff from being put to a new action when by accident, mistake, or inadvertence he had in his declaration failed to describe his claim with legal accuracy. In a great proportion of the cases, say the court, where amendments are allowed, the ground of action is in one sense changed, as where for instance the note in suit is incorrectly described; but amendments in such cases are very frequent where the court is satisfied that the error arose merely from mistake or inadvertence, and that the action was intended to be brought for the cause of action described in the amendment.

Other examples of like import are given in the opinion, and the court remarks that the phrase, "ground of action," is not used in the statute in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit than to the technical meaning of the words; and added, that such a construction had always been given to

the phrase as would further that object. *Bulkley* v. *Andrews*, 39 Conn. 523, 535.

Where power is given to the court to allow the amendment, the ruling of the court in that regard is a matter of discretion, and is not the subject of error. *Stuart* v. *Corning*, 32 id. 105, 108; *Merriam* v. *Langdon*, 10 id. 460, 472.

New counts setting forth more specifically the cause of action mentioned in the prior counts are not objectionable, as it cannot be held in such a case that the new counts describe a new cause of action. *Baldwin* v. *Walker*, 21 id. 168, 180; *Hollister* v. *Hollister*, 28 id. 178, 180.

Whenever the declaration misdescribes a writing which constitutes the cause of action, the State courts will allow the plaintiff to amend and make the description accurate, and it is even held that in an action for a breach of covenant the plaintiff may add a new count setting forth a new and distinct incumbrance not previously mentioned in the declaration. *Spencer* v. *Howe*, 26 id. 200.

Cases appealed, it is held in that State, may be amended in the appellate courts; and the rule is well settled, that if the new counts are founded upon the same transaction as the old ones, they do not change the ground of action, within the meaning of the act allowing amendments. *Howland* v. *Couch*, 48 id. 47–50.

Writs of summons or attachment in that State may be sued out in civil actions, and the defendant, as matter of argument, to show that the amendment was improperly allowed in this case, insists that its effect would be to discharge an attachment, as it would otherwise enlarge the lien which the attachment created. Two answers may be made to that suggestion in the case: 1. It is not shown that any of the property of the defendant was attached by the sheriff. 2. But if it was, the defendant will not be injured if the plaintiff sees fit to discharge his attachment.

Without more, these authorities are sufficient to show that the ruling of the Circuit Court in allowing the amendment was fully justified by the State decisions, and that it is correct.

Suppose that is so, still it is insisted by the defendants that

the ruling of the court embraced in the second assignment of error was erroneous, and that the judgment for that cause must be reversed.

Articles of agreement were executed between the parties to the effect that the defendants agreed to furnish for the plaintiffs cotton of a certain description, to keep the mill of the plaintiffs supplied for a certain time, the cotton to be manufactured by the plaintiffs into yarn, two-threaded and of a certain described fineness, for thirty cents per pound, allowing sixteen per cent for waste. Cash payments the first day of each month were to be made by the defendants for manufacturing the yarn. Under that contract, as set forth at large in the transcript, the defendants delivered a large amount of cotton to the plaintiffs, who manufactured it into yarn, which they delivered to the defendants. Invoices of cotton purchased by the defendants were shipped to the plaintiffs, and when the same was manufactured into yarn by the plaintiffs, the yarn was sent back in bags, accompanied with invoices, to the defendants.

Accounts between the parties were rendered monthly, and, when adjusted, the plaintiffs drew upon the defendants for the money due for manufacturing the yarn; and it appears that the drafts were uniformly paid until the last month of the contract. Payment of the last draft being refused, the plaintiffs brought assumpsit, and furnished the defendants with the bill of particulars exhibited in the record.

It appears that the defendants were tape manufacturers, and that they procured the yarn for the purpose of manufacturing tape, and they offered evidence tending to show that when the contract terminated they had on hand a large quantity of yarn not woven into tape, which they had tested, and for the first time discovered that it was of a coarser quality than that specified in the contract, and they alleged that if the whole was of that quality they had been seriously damaged.

Opposed to that, the plaintiffs offered evidence tending to disprove that charge, and to show that during the early part of the contract they, at the request of the defendants, manufactured a certain quantity of yarn for them of a lower grade, and that if the defendants had on hand any of a lower grade than

the contract required, it must be part of that so manufactured by the plaintiffs at the request of the defendants, who accepted the same with full knowledge of its defects.

Four letters upon the subject were written by the defendants to the plaintiffs, and in the course of the trial the defendants gave those letters in evidence, together with one written to them by the plaintiffs in reply to the last of their series. In that letter the plaintiffs refer to the fact that the defendants claim a deduction of five cents per pound on a specified quantity of the yarn, and state that they deduct that amount from the bill, adding to the effect that it leaves a balance due of $2,680.24, &c.

For the purpose of rebutting any alleged admission contained in that letter, the plaintiffs gave notice to the defendants to produce the letters written by the plaintiffs in reply to the other letters to them given in evidence by the defendants. Said letters not having been produced, and it appearing that no copies had been kept and that the originals were mislaid or lost, parol evidence of their contents was admitted, which showed that the plaintiffs denied the assertion of the defendants that the yarn was of a lower grade than the contract required; and they called the surviving partner of the firm, who was the writer of the letter of the plaintiffs given in evidence, and he was asked by the counsel of the plaintiffs whether he intended in and by that letter to admit that the defendants' claim for damages was valid and that the yarn was below the contract grade, to which question the counsel of the defendant objected, and the court sustained the objection and excluded the testimony.

Failing in that, the plaintiffs then asked the witness whether his acceptance of the defendants' proposition to deduct five cents per pound from the quantity of yarn named was because he admitted that the yarn was not according to contract or to settle a controversy. Seasonable objection was made to the question by the defendants; but the court overruled the objection, and the witness answered that he accepted the proposition because he did not wish to be obliged to commence a lawsuit in the city of New York, and to incur the expenses of a trial in the courts of that State; and the defendants excepted to the ruling of the

court, which is the foundation of the second assignment of error.

Evidence was then introduced by the plaintiffs showing that the defendants refused to pay the draft for the balance, making that deduction, and that they demanded the same reduction in price upon all the yarn previously manufactured and delivered. Certain exceptions were also taken to the charge of the court, but they are not embraced in the assignment of errors, and for that reason will not be re-examined.

Doubtless the general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury, or, in other words, where the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation. *Etting* v. *The Bank of the United States*, 11 Wheat. 59; *Barreda* v. *Silsbee*, 21 How. 146, 167.

Other cases have been decided by this court in which the same principle was applied, and in which the doctrine is more fully explained and illustrated. *Iasigi* v. *Curtis*, 17 How. 183, 196.

Damages were claimed by the plaintiff in that case for a false representation respecting the pecuniary standing of a third person, whereby he, the plantiff, had been induced to sell goods and had incurred loss. Letters were introduced and facts and circumstances connected with the letters proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they were calculated to inspire and did inspire a false confidence in the pecuniary responsibility of the party, to which the defendant knew he was not entitled.

Admissions by a party or by an authorized agent, either in court or out, may in general be given in evidence; but the circumstances surrounding the admission, the purposes for which

it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that the party making the admission is not bound by it, and will not be estopped from denying its truth, and in view of the showing on both sides, allowing each to prove the whole truth, it will be for the jury to determine how the proof stands on the facts in controversy on which the admission is claimed to bear. *Perry* v. *Simpson Waterproof Manuf. Co.*, 40 Conn. 313, 317.

The defendants charged at the trial that the act of the plaintiffs in making the deduction proposed by the defendants was presumptive evidence that the plaintiffs admitted that they had not fulfilled their contract. This was expressly denied by the plaintiffs. On the other hand, the plaintiffs claimed that their act in making the deduction, taken in connection with the fact that they explicitly denied that they had broken their contract, was presumptive evidence, not that they admitted a breach of the contract, but that they made the deduction to avoid the expense of litigation. Neither of the presumptions was contrary to the language of the letter, and inasmuch as it was doubtful what the precise intent of the writer was, it is clear that the question of intention was open to explanation.

Parol evidence is admissible to contradict or vary the language of a valid written instrument, by which is meant that the language employed by the parties in making it, and no other, must be used in ascertaining its meaning. Argument to support that proposition is unnecessary, and yet it is universally admitted that it may be read in view of the subject-matter and the attendant circumstances, in order more perfectly to understand the meaning and intent of the parties. 1 Greenl. Evid. (12th ed.), sect. 277.

Written instruments as used in the rule, says Taylor, include not only records, deeds, wills, and other instruments required by statute or by the common law to be in writing, but every document which contains the terms of a contract between different parties. Text-writers everywhere support that rule; but Taylor admits that the rule will not strictly apply to certain less formal documents, of which he gives several examples. 2 Taylor, Evid. (6th ed.) 988.

Extrinsic evidence, it may be admitted, is not admissible in

expounding written contracts to prove that other terms were agreed to, which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it; still it is competent, said Shaw, C. J., to offer parol evidence to prove facts and circumstances respecting the relations of the parties, the nature, quality, and condition of the property which constitutes the subject-matter respecting which it was made. *Knight* v. *The New England Worsted Co.*, 2 Cush. (Mass.) 271–283.

Where a party was about to publish an advertising chart, and the defendant promised in writing to pay him fifty dollars for inserting his business-card in two hundred copies of the chart, the Supreme Court of Massachusetts held, in an action to recover the amount, that parol testimony was admissible for the interpretation of the contract and its application to the subject-matter, that at the time of the making of the agreement the plaintiff represented and promised that his chart should be composed of a certain material and be published in a certain manner. In disposing of the case, the court advert to the rule that the obligation of a written contract cannot be abridged or modified by parol evidence, but add that it is equally well settled that, for the purpose of applying the terms to the subject-matter and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is legitimately admissible, and for that purpose all the facts and circumstances of the transaction out of which the contract arose, including the situation and relation of the parties, may be shown. Authorities in great numbers are cited in support of the proposition; and the court further say, that the purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. *Stoops* v. *Smith*, 100 Mass. 63–66.

Apply the strictest rule to the question, and it is clear that the ruling of the Circuit Court is correct, as the answer of the witness, which was admitted, did not tend in any view to contradict any thing stated in the letter; but the ruling of the court may also be sustained upon the ground that the letter was a mere offer of compromise, which could not prejudice the rights of the plaintiffs, especially as the record shows that the

defendants subsequently refused to pay the draft drawn for the balance.

Offers of compromise to pay a sum of money by the way of compromise, as a general rule, are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication. *Gerrish* v. *Sweetser*, 4 Pick. (Mass.) 374; *Bridge Company* v. *Granger*, 4 Conn. 142, 148; *Stranahan* v. *East Haddam*, 11 id. 507, 513.

By all or nearly all the cases the rule as established is not that an admission made during or in consequence of an effort to compromise is admissible, but that an offer to do something by the way of compromise, as to pay sums of money, *allow certain prices*, deliver certain property, or *make certain deductions*, and the like, shall be excluded. These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation.

Decided cases may be found where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule in general, both in England and the United States, is that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise. *Lofts* v. *Hudson*, 2 Man. & R. 481–484; Phil. Evid. (5th Am. ed.) 427, note 124; 1 Greenl. Evid., sect. 192.

Suffice it to say that such evidence having been admitted, it was clearly competent to give evidence to explain it, especially as the evidence given did not contradict any of the terms of the letter introduced by the defendants.

Judgment affirmed.

BRODER *v.* WATER COMPANY.

A., a water and mining company, constructed in 1853, over public land in California, a canal, and its right, which it has ever since exercised, to use the water for mining, agricultural, and other purposes has been uniformly recognized by the local customs, laws, and the decisions of the courts of that State. B. is now the owner of lands through which the canal runs. He acquired title to one portion of them by a pre-emption settlement made after the passage of the act of July 26, 1866 (14 Stat. 251), and to another portion under the grant made to the Central Pacific Railroad Company, by the amended Pacific Railroad Act of July 2, 1864. 13 Stat. 356. In his suit against A., B. seeks the recovery of damages, and also prays that the canal may be declared a nuisance, and as such abated. *Held*, 1. That B.'s title under the pre-emption laws is subject to A.'s right of way under said act of 1866. 2. That said act expressly confirmed to the owners of such canals a pre-existing right, which the government had by its policy theretofore recognized. A. had, therefore, within the meaning of said act of 1864, a "lawful claim" to the continued use of the water, which was not defeated or impaired by the grant of the lands to said railroad company.

ERROR to the Supreme Court of the State of California.

The facts of the case and the legislation bearing upon them are set out in the opinion of the court.

Mr. John H. McKune for the plaintiff in error.

Mr. A. P. Catlin, *Mr. S. Shellabarger*, and *Mr. J. M. Wilson*, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The Natoma Water and Mining Company owns a canal for conducting water and distributing the same for mining, agricultural, and other uses, which is some fifteen miles long. It was completed in the year 1853, and since then has been in constant and successful operation under the control and in the possession of the company. Its cost was about $200,000. The court of the first instance on the trial of this cause found also as a fact that the canal and branches have, ever since their construction, been uniformly acknowledged and recognized by the local customs, laws, and the decisions of the courts of the State of California, in which they lie, and that the land covered by them is indispensable to their use. At the time they were finished, and for many years after, in fact up to the passage of the Pacific Railroad Acts of 1862 and 1864, the land

through which they ran was the public property of the United States. A portion of it is included in the grant made by that act to what has since, by change of name and consolidation of corporate franchises, become the Central Pacific Railroad Company, and the plaintiff in error, by proper conveyance from said company, has become the owner of it. A small part of it is traversed by the canal, and he brought this action in the proper court of that State against said water and mining company, to have the canal declared a nuisance and abated, and to recover $12,000 damages on account of its maintenance on his land.

The case was submitted to the court, which found the facts we have stated, and others that will be referred to.

The inception of the title of plaintiff to the land described in his petition, other than that derived from the railroad company, was a declaratory statement for pre-emption, filed Aug. 6, 1866, by himself for one tract, and a similar statement filed Sept. 14, 1866, by his brother, Jacob Broder, for another. But prior to either of these dates, to wit, on the 26th of July of the same year, Congress enacted a law, the purpose of which was to deal with the rights of miners who had theretofore, without objection, and with the tacit encouragement of the United States, discovered, developed, and mined the public lands. 14 Stat. 251. The ninth section of that act contains this declaration: "That wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed." p. 253.

As to the canal of the defendant, so far as it ran at that date through the land of the United States, this act was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and cannot now disturb it.

In reference to his lands held under conveyance from the railroad company, it might be a question of some difficulty

whether the right was so far vested in that company before the passage of this act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that the defendant is under the necessity of relying on that statute.

It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, id. 670; *Forbes* v. *Gracey*, 94 U. S. 762; *Jennison* v. *Kirk*, 98 id. 458.

We turn now to the act of July 2, 1864 (13 Stat. 356), which makes the final grant to the Pacific railroad companies, the acceptance of which by the companies bound them to its terms, and we find in sect 4, which enlarges the grant of lands made by the act of 1862, this clause of reservation from the general terms of the grant: "Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, *or other lawful claim*, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist." p. 358.

We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to

exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection. See *Wolcott* v. *DesMoines Company*, 5 Wall. 681; *Williams* v. *Baker*, 17 id. 144; *Leavenworth, Lawrence, & Galveston Railroad Co.* v. *United States*, 92 U. S. 733.

In construing the grant to the Pacific railroad companies this principle is eminently applicable. The lands were vastly greater in extent than those embraced in any previous grant, and surrounded by much more varied circumstances. The number and diversified character of the interests which might be affected largely exceeded any with which Congress had theretofore dealt.

Hence we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in the reservation clause which had become a formula in previous grants.

Not only are prior reservations made by the government, and rights of pre-emption excepted, but the improvements of *bona fide* settlers on land returned or denominated mineral lands, and the timber necessary to support the miners' improvements, and *any other lawful claim*, are unaffected by the grant. Of course, this means any honest claim evidenced by improvements or other acts of possession.

The defendant had been in possession of the claim in question for twelve years when this act was passed, and had expended $200,000 upon it. It was of great utility, nay necessity, to a large agricultural and mining interest, and we cannot doubt that it was of the class which this section declared should not be defeated by the grant which Congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is

Affirmed.

GREENLEAF v. GOODRICH.

1. In 1862 and 1863, A. imported into the port of Boston certain goods upon which the collector imposed, and A. under protest paid, a duty of thirty per cent *ad valorem* under the mixed-material clause of the act of March 2, 1861 (12 Stat. 192), and of two cents per square yard under the ninth section of the act of July 14, 1862. Id. 553. A., claiming that under the act of 1862 the goods were subject only to an *ad valorem* duty of thirty per cent, brought suit to recover the difference. It appeared in evidence that the goods were known in trade and were bought and sold as poil de chevres, reps, plaids, lustres, Saxony dress-goods; that they were always woven in colors, the yarns being dyed or colored before weaving; that they never existed in the gray or uncolored condition, but were made as delaines are made, with a cotton warp and a worsted weft, the difference between them and delaines being that the latter are a fabric of all-wool, or cotton warp and worsted weft, made of yarns not dyed, the cloth being printed or dyed in the piece; that as early as 1857 both the all-wool delaines and those with cotton warp and wool or worsted filling were known in trade by names changing from time to time, to suit the fancy of importers and purchasers. It also appeared that in several other particulars A.'s goods differed from delaines. The court charged the jury that, in addition to the duty of thirty per cent *ad valorem* imposed by the act of 1861, the act of 1862 "imposed a specific duty on all delaines, whether colored or uncolored, and all goods of similar description to delaines, whether colored or uncolored, if such delaines or goods of similar description do not exceed in value forty cents a square yard," and that it was for them to determine whether A.'s goods were "similar in description to these delaines, whether they are colored or uncolored." *Held*, that the instruction was proper.
2. The changes of classification and phraseology made in the act of 1862 show an intention to take out of the mixed-material clause of the act of 1861 (which was limited to manufactures not otherwise provided for) some descriptions of goods which the act placed there, and, by transferring them to another class, subject them to the additional duty prescribed for that class.
3. The phrase "of similar description" is not a commercial term, and the tariff acts do not contemplate that goods classed under it shall be in all respects the same.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. Charles Levi Woodbury for the plaintiff in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

That the goods imported by the plaintiffs were subject to a

duty of thirty per cent under the act of March 2, 1861, is not denied. They belonged to the class described in that act as "manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool or worsted, or flax." The controversy between the parties now is over the question what was added to that duty by the act of July 14, 1862.

By the third item of sect. 13 of the act of 1861 a duty of twenty-five per cent *ad valorem* was imposed upon "all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, gray or uncolored, and on all other gray or uncolored goods of similar description;" "on bunting and on all stained, colored, or printed, and on all other manufactures of wool, or of which wool shall be a component material, not otherwise provided for, a duty of thirty per cent *ad valorem*."

By sect. 22 of the same act a duty of thirty per cent was levied in the mixed-material clause quoted above. A subsequent act, passed on the 5th of August, 1861, amended the third item of sect. 13 of the act of March 2, 1861, by striking from it the word "wool" wherever it occurred, and inserting the word "worsted" in lieu thereof.

Thus stood the law when the act of 1862 was enacted. It was an act to increase the duties leviable under the act of 1861. The ninth section enacted that in addition to the duties theretofore imposed there should be levied, collected, and paid "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard.

"On bunting, worsted yarns, and on all other manufactures of worsted, or of which worsted shall be a component material, *not otherwise provided for*, five per cent *ad valorem*."

A subsequent section of the act imposed an additional duty of five per cent *ad valorem* also on manufactures, *not otherwise provided for*, composed of mixed materials, in part of cotton, silk, wool or worsted, hemp, jute, or flax.

An examination of these provisions will reveal very plainly that the classification of the articles made subject to an in-

creased duty is not the same as it was in the act of 1861. The first clause of the third item of sect. 13 of the act of 1861, as amended in August, embraced only delaines composed wholly or in part of worsted, and goods of similar description, woven in the gray, or uncolored. The act of 1862 grouped with them delaines made wholly or in part of wool, mohair, or goat's hair, and also delaines composed wholly or in part of worsted, and goods of similar description, not in the gray or uncolored. It was, therefore, much more comprehensive than the former act. So the second clause of the third item of the thirteenth section of the act of 1861 differs much from the corresponding clause of the act of 1862.

Similar changes of classification appear when the mixed-material clauses of the two acts are compared. The changes were evidently not without a purpose.

Such were the statutory provisions when the plaintiffs' importations were made. The collector exacted duties at the rate of thirty per cent *ad valorem*, and two cents per square yard, claiming that the goods were goods of similar description to the delaines mentioned in the ninth section of the act of 1862, and did not exceed in value forty cents per square yard. On the other hand, the plaintiffs claimed that the goods having been classed under the act of 1861, among manufactures of mixed materials, not otherwise provided for, and subjected to a duty of thirty per cent, continued in that class under the act of 1862, and were, therefore, chargeable only with a duty of thirty-five per cent. Accordingly, having paid the duty exacted by the collector, under protest, they have brought this suit to recover the difference between thirty-five per cent *ad valorem*, and thirty per cent and two cents per square yard.

It appeared in evidence that the goods were known in trade and were bought and sold as poil de chevres, reps, plaids, lustres, Saxony dress-goods. They were always woven in colors, the yarns being dyed or colored before weaving. They never existed in the gray or uncolored condition. But they were made, as delaines are made, with a cotton warp and a worsted weft, the difference between them and delaines (as stated in the plaintiffs' protest) being that delaines are a fabric of all-wool, or cotton warp and worsted weft, and made of yarns not

dyed, the cloth being printed or dyed in the piece. It further appeared that as early as 1857 both the all-wool delaines and those with cotton warp and wool or worsted filling were known in trade by names changed from time to time, to suit the fancy of importers and purchasers. It also appeared that in several other particulars the goods of the plaintiffs differed from delaines. To these differences it is unnecessary now to refer in detail.

Now, conceding, as we may, that the plaintiffs' goods came under the mixed-material clause of the act of 1861, being excluded from the delaine clause, that embraced only goods woven in the gray, it is not perceived how that can throw any light upon the proper construction of the act of 1862, which obviously intended a different classification. Undoubtedly, acts of Congress *in pari materia* are to be construed with reference to each other. And it may be admitted that when, in a later act, Congress uses expressions that had a recognized meaning in a former act relating to the same subject, they intended to use them in the same sense in which they were first used, that is, with their recognized meaning. But this rule has no bearing upon a case like the present. This is not a question respecting the meaning of terms. We cannot see, therefore, that the Circuit Court erred in refusing to affirm the plaintiffs' first four points, and in declining to rule under what clause of the act of 1861 the imported goods fell. After all, the question for that court was the construction of the act of 1862, and the construction given was, we think, correct. It could not have been different if the court had undertaken to construe with it the clauses of the act of 1861. As we have said, the changes of classification and of phraseology made in the act of 1862 show an intention to take out of the mixed-material clause of the former act (which was limited to manufactures not otherwise provided for) some descriptions of goods which the act placed there, and by transferring them to another class, subject them to the additional duty prescribed for that class. If not so, what was the necessity for a reclassification? Why change the language? It would have been sufficient to declare what additional duty should be paid by each class as formerly arranged. The act of 1861, therefore,

could furnish no aid to the construction of the act of 1862, and reference to it was unimportant, except for the purpose of discovering the percentage of duties it imposed.

The fifth point was properly refused. The words "of similar description" in the delaine clause of the act of 1862 cannot be affirmed to have referred only to such goods as have the greater number of characteristics in common with delaines. Some common characteristics are of much more importance than others in determining resemblances.

The sixth point propounded was as follows: "Revenue laws designate and class substances according to the general usage and known denominations of trade. The words 'all goods of similar description' in the Tariff Act of 1862 refer to a similarity for revenue purposes with goods previously enumerated, and this is determined by what was then known and classed among merchants as similar goods; and if being woven in the gray or natural color of the worsted and other materials of which they are composed is found to have been an important and pervading characteristic commonly distinguishing goods known among merchants as of similar description with delaines, then the goods on which the duties in this case were assessed were not of similar description with delaines, unless the jury find they were so woven in the gray or natural color, and unless these goods possessed all the pervading characteristics which in 1862 were commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines, from all other goods, the plaintiffs are entitled to a verdict." This point the court declined to affirm, and we think rightly, for several reasons.

There was no evidence, so far as it appears, to justify its presentation. The record exhibits nothing tending to show what was commonly understood among merchants as distinguishing goods, known in commerce as of a similar description with delaines, from all other goods. Nor was there any evidence that there were any goods known by merchants, or in commerce, as goods of a similar description with delaines, much less was it in proof that being woven in the gray was regarded by merchants as determining that goods so woven were not of similar description with delaines. In regard to all these matters the record is

silent. Composed, as the goods were, of the same materials as delaines, having a similar general appearance, and intended for the same uses, they might well have been of similar description with colored delaines, though there were differences in the process of manufacture.

The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, delaines.

The court charged the jury, in answer to a prayer of the defendant, that the similarity referred to in the expression "'goods of similar description,' in the act of 1862, is a similarity in respect to the product, and its adaptation to uses, and to its uses, and not merely to the process by which it was produced, and that if a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not goods of similar description, within the meaning of the statute." And again: "These words are to be taken and understood in their popular and received import, as generally understood in the community at large at the time of the passage of the act." Other similar instruction was given, and the court called attention to all the alleged dissimilarities urged by the plaintiffs, including the fact that delaines are woven in the gray, and that the plaintiffs' goods were not, and summed up as follows: —

"If you find that the product or result is an article for ladies' dresses made with a cotton warp and worsted filling, the question for your determination is, whether the two kinds of goods are substantially the same and alike. The process of manufacture, the worsted in the goods of the plaintiffs being dyed previous to weaving, is an element to be considered by the jury in coming to their conclusion, but not alone and distinct from all others which may have been established. It is for the jury to determine, from all the evidence in the case, whether, by the colored filling made and woven in the way and manner described with a cotton warp, the product is or not an article substantially similar and like the delaine fabrics, whether or not, while varying more or less in some particulars from delaines, the goods were or not substantially the same or substantially differ-

ent from them. If substantially the same article, then the duties were properly assessed; but if they were substantially different, and the plaintiffs' goods were not of a similar description to the delaine fabrics, then they were not subjected to the additional duty."

Notwithstanding the strenuous objections urged against such a submission to the jury, we think it was correct. At least it was quite as favorable to the plaintiffs as they had a right to demand. Reliance is placed upon the rule, which we admit to be established, that the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws. But the present is not a case of commercial designation of articles. The phrase "of similar description" is not a commercial term, and if it were, there is no evidence in the record to show what it is understood to mean among merchants and importers. In *Maillard* v. *Lawrence* (16 How. 251) we have an instructive case bearing upon this subject. There the question was whether shawls came under one schedule of the act of 1846, imposing a duty of twenty-five per cent, or under another charged with a thirty per cent duty. In schedule C was included "clothing ready made and wearing-apparel of every description, of whatever material composed, made up or manufactured," and it subjected them to thirty per cent duty. Schedule D described "manufacturers of silk, or of which silk shall be a component material, not otherwise provided for, manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," and imposed a twenty-five per cent duty. The Circuit Court had been requested to instruct the jury that if they should find that at the date of the act the shawls in question were commercially known as manufactures of worsted, or of which worsted was a component material, and that they were not known in trade as clothing ready made, or as wearing-apparel, they were subject only to a duty of twenty-five per cent. This instruction was refused, and this court held, correctly, holding that, while it was true that where words of art, or phrases, are novel or obscure, as in terms of art, it was proper to explain them by reference to the art or science to which they were appropriate, the rule was not so when the words or phrases

are familiar to all classes, grades, and occupations; and that the popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private transactions. The court added, that if it could be conceded that, in the opinion of mercantile men, shawls were not considered wearing-apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language. The case was rested on the basis that "wearing-apparel" was not a technical term. Much less is the phrase, goods "of a similar description."

Upon the whole, therefore, we think there was no error in the charge of the judge in the court below.

Judgment affirmed.

JEFFREY v. MORAN.

A railroad company in Ohio was reorganized under a statute of that State of April 11, 1861, the sixth section of which provides as follows: "The lien of the mortgages and deeds of trust authorized to be made by this act shall be subject to the lien of judgments recovered against said corporation, — after its reorganization, — for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts, or liability as a common carrier thereafter made or incurred." The new company executed, April 1, 1864, a mortgage on its road to secure the payment of the principal and interest of certain bonds. Default having been made in the payment of the interest, a foreclosure suit was instituted, and a decree rendered whereunder a sale of the road was made, which was reported to the court Dec. 2, 1869, and on that day confirmed. The proceeds of the sale were less than the mortgage debt. A. was killed on the road June 22, 1866. His administrator, in a court in one of the counties through which the road passed, recovered, Feb. 28, 1871, judgment against the company for $5,000. In November, 1875, he became a party to the foreclosure suit, and claimed payment out of such proceeds. *Held*, 1. That by the law of Ohio a judgment is a lien from "the first day of the term at which the judgment is rendered," and as before that day the road had been sold and the sale confirmed, no lien by the judgment existed. 2. That there being no lien at law upon the road, there could be none in equity upon the fund arising from the sale.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. S. T. Crawford and *Mr. Thomas S. Young* for the appellant.

Mr. M. A. Daugherty, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

A corporation existed in Ohio known as the Cincinnati, Wilmington, and Zanesville Railroad Company. It owned and operated a road extending from the city of Zanesville to the village of Morrow in that State. The company became insolvent, and the road was sold on the 3d of June, 1863, under foreclosure proceedings upon a mortgage which the company had given. Charles Moran became the purchaser in trust for the creditors and stockholders. The original company was reorganized on the 11th of March, 1864, pursuant to a statute of the State of April 11, 1861, under the name of the Cincinnati and Zanesville Railroad Company. On the 12th of March, 1864, Moran conveyed to the new company, which thereupon executed to him and W. Shall a mortgage to secure the payment of the principal and interest of certain bonds therein described. This mortgage bore date on the 1st of April, 1864. Default having been made in the payment of the interest accruing on these bonds, Moran, on the 30th of April, 1869, filed a bill of foreclosure in the court below. On the 4th of May following, the road was put by the court into the charge of the officers of the company as receivers. On the 6th of October then next, a final decree was entered, finding the amount due, and ordering the premises to be sold unless it was paid within twenty days.

On the 2d of December following a sale was reported, and on the same day it was confirmed by the court. The proceeds of the sale were largely less than the amount intended to be secured by the mortgage. On the 22d of June, 1866, Zentmeyer, the appellant's intestate, was killed on the road. On the 16th of July, 1867, the appellant, as his administrator, sued the company in the Court of Common Pleas of Clinton County, through which the road passes, and on the 28th of

February, 1871, he recovered a judgment for $5,000. On the 5th of November, 1875, he was made a party to the proceedings in the foreclosure case. He thereupon answered and filed a cross-bill, in the nature of a creditor's bill, claiming to have the judgment paid out of the proceeds of the sale of the road in the hands of Moran. The court decreed against him, and he appealed to this court.

Several objections have been taken to the claim of the cross-bill by the counsel for the respondent, which the view we take of the case renders it unnecessary to consider.

The counsel for the appellant have pressed upon our attention certain provisions of the mortgage under which the road was sold. We think it too clear to require discussion, that they have no application to the point upon which the case must turn. We shall, therefore, pass them by without further remark.

The mortgage was executed under the act before mentioned, of April 11, 1861, and was subject to its provisions. The sixth section of that act is as follows: —

"The lien of the mortgages and deeds of trust authorized to be made by this act shall be subject to the lien of judgments recovered against said corporation — after its reorganization — for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts, or liability as a common carrier thereafter made or incurred."

By the law of Ohio, a judgment is a lien upon all "the lands and tenements of the debtor within the county where the judgment is entered, from the first day of the term at which judgment is rendered, . . . but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered." 2 Rev. Stat. of Ohio, Swan & Cr. 1064. If execution shall not be sued out within five years from the date of the judgment, the latter becomes dormant and the lien expires. Id. 1067. Judgment liens are the creatures of positive law, without which they cannot exist.

A State may regulate them as it deems proper. *Corwin* v. *Benham*, 2 Ohio St. 36. When this judgment was rendered, there was no real estate of any kind in Clinton County belonging to the railroad company. The roadway and all its appurtenances had been sold to Moran under the decree upon the mortgage, and the sale confirmed more than a year before that time. Thereafter the relation of the property to the company was in all respects as if the company had never owned it. A lien by the judgment was, therefore, impossible.

There being no such lien at law upon the road, there could be none in equity touching the fund arising from the sale. *Olcott* v. *Bynum* (17 Wall. 44), cited by the learned counsel for the appellant, does not, therefore, affect the case.

The counsel would have us give the same construction to the terms "the lien of judgments recovered against the corporation," as if they were "valid claims against the corporation," &c. The language of the statute is clear and explicit. It has a specific meaning in the jurisprudence of Ohio, and seems to have been chosen, *ex industria*, to express exactly the category it defines. There is as much difference with respect to the property between a claim secured by a judgment lien, and one not so secured, as there is between a demand secured by mortgage, and one not secured at all. In such cases the mortgage and the judgment lien are equivalents. In both the binding effect is the same, and the law prescribes the consequences. Here, if the lien had subsisted, though junior in date, it would have had priority over the mortgage. The latter was subject to the statute, and the statute would have given to the lien that effect. No reasoning can successfully maintain that a claim merely in judgment and a judgment *lien* are the same thing in legal effect, any more than in fact. To hold otherwise would be to make the law, and not simply to apply it. The former is beyond the sphere of our authority, the latter is our duty. It is only when a claim has ripened into a judgment where there is property to be bound by it, that a lien can subsist. This element is indispensable under the law to such a result. If the legislature intended that a judgment — not a lien on the mortgaged premises — should have the same effect as one that was such lien, it would have been easy to say so, and

this would doubtless have been done. No word stretching or bending can make the language employed touch the fund in dispute.

It does not appear that the foreclosure sale, from which Moran derived title, was made in the process of another reorganization under the statute. If this were so, the last clause of the first section would control the rights of the parties. It is there declared that "every such agreement" [for reorganization] "shall provide that the unsecured debts of the company incurred for repairs or running expenses shall be paid in money or bonds of the reorganized company, as hereinafter provided; said bonds to be of the highest class issued. A copy of the terms of said agreement shall be filed in said court before the rendition of said decree." But as the mortgagees did not avail themselves of the act, they are not bound by its requirements. This clause, nevertheless, throws light upon the subject we have been considering, and, therefore, we refer to it in that connection.

Decree affirmed.

PACIFIC RAILROAD v. KETCHUM.

1. An appeal will not be dismissed upon the ground that the decree from which it was taken was rendered by consent; but no errors will be considered here which were in law waived by such consent.
2. A recital in the decree that it was assented to by the solicitor of one of the parties is equivalent to a direct finding that he had authority to do what he did, and, so far as the question is one of fact only, is binding upon this court on appeal.
3. The ruling in *Removal Cases* (100 U. S. 457), on the second section of the act of March 3, 1875 (18 Stat., part 3, 470), stated and declared to be applicable to the jurisdiction of the Circuit Court, as the same is prescribed by the first section of that act.
4. For the purpose of an appeal, this court need not inquire when the Circuit Court first obtained jurisdiction of the suit. It is sufficient if that court had jurisdiction when the decree appealed from was rendered.
5. The purchase by the solicitor of a railroad company of its property at a judicial sale, made pursuant to a decree in a foreclosure suit, is not of itself necessarily invalid. It will, however, be closely scrutinized, but until impeached must stand.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This case presents the following facts: —

On the 10th of July, 1875, the Pacific Railroad, a Missouri corporation, mortgaged its road and other property to Henry F. Vail and James D. Fish, trustees, citizens of New York, to secure a proposed issue of bonds amounting, in the aggregate, to $4,000,000. This mortgage will hereafter be referred to as the "third mortgage." The bonds were to bear date as of May 1, 1875, and become payable twenty years thereafter, with interest at the rate of seven per cent, falling due semi-annually on the first days of May and November in each year. The principal object of this new issue was to take up by exchange or otherwise outstanding income and improvement bonds of the company, amounting in all to $3,500,000. The mortgage contained a clause to the effect that, if the company should fail to pay the interest on any of the bonds thereby secured, for six months after the same became due and payable, and demand made therefor, or if the principal of any of the bonds, when payable, should not be paid for six months after demand, the trustees might, on the written request of holders of bonds to the amount of $500,000, the principal or interest of which should then be in arrear and unpaid, sell the mortgaged property at public auction, in the city of St. Louis, giving notice thereof in a manner particularly specified, and execute and deliver conveyances to the purchaser, applying the proceeds of the sale to the payment of the bonds.

The property mortgaged was covered by other mortgages. One was to Uriah A. Murdock, James Punnett, and Luther C. Clark, citizens of New York; another, to Edwin D. Morgan and Joseph Seligman, also citizens of New York; another, to Rufus J. Lackland and Dwight Durkee, citizens of Missouri; another, to James Baker, a citizen of Missouri, and Jesse Seligman, a citizen of New York; and all were prior in lien to the third mortgage.

Default having been made in the payment of the interest falling due Nov. 1, 1875, on the bonds secured by the third mortgage, George E. Ketchum, a citizen of New York, claiming to be the owner and holder of many of the bonds, commenced this

suit in the court below, on the 11th of November, in behalf of himself and the other bondholders, to foreclose the mortgage. To this suit the railroad company and the trustees of all the mortgages, including Vail and Fish, were made defendants, their citizenship being fully set forth in the bill. The superior right of all the prior mortgages was conceded, and it was also admitted that the full amount of their authorized issues was outstanding, but it was alleged that the interest on all except that secured by the third mortgage had been paid promptly as it matured, and that there was then no default. It was also alleged that the value of the property was greater than the amount of all the prior liens.

The bill further stated that about $2,000,000 of the income and improvement bonds had been exchanged for the bonds secured by the third mortgage, and that about $300,000 of the last-named bonds had been negotiated otherwise than by exchange, and were then outstanding. It then alleged the non-payment of interest falling due Nov. 1, 1875, after due demand made; that there was a large amount of money due for taxes; that the company was without means to pay them and its valid obligations in full as the latter became due; that its commercial paper had been protested; that it was liable to actions, suits, and proceedings on account thereof; and that there was great danger that the property covered by the mortgage might be attached or levied upon under execution or other legal process.

The bill then proceeds as follows: "Your orator further shows unto your honors that an application has been made by your orator, on behalf of himself and other holders of bonds secured by said mortgage to the defendants Henry F. Vail and Henry D. Fish, to take proceedings to foreclose the aforesaid mortgage, and to protect the interest of your orator and such other holders; but that no such proceedings have been taken, and as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the non-payment of the interest due Nov. 1, 1875, and for such reason prefer not to take such proceedings; and your orator being apprehensive that his interest and the interests of

other holders of like bonds may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action in his own behalf, and on behalf of all others similarly situated and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein."

The prayer was that the mortgaged property might be sold subject to the liens of the prior mortgages, and that, if necessary, an account might be taken. There was also a prayer in the usual form for the appointment of a receiver.

Process was duly issued and served on the 13th of December, 1875, on such of the defendants as were citizens of Missouri, and on the 8th of January, 1876, an order was taken for service on the non-resident defendants in the manner required by the rules of the court; but it does not appear that any such service was actually made. On the same 8th of January, one Thomas P. Akers, representing that he was a stockholder of the company, that the mortgage sued on was a fraud, and that the corporation would not resist the suit, asked that he might be permitted to come in as a defendant to protect his interests. On the 7th of February, 1876, the company filed an answer, in which it substantially confessed all the allegations of the bill, and asserted the binding character of the bonds and mortgage. The answer concluded, however, as follows: "But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant were guilty of fraud in issuing the same. Therefore, this defendant asks this honorable court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper." James Baker signed the answer as solicitor of the company, as did also the secretary of the company, and the corporate seal was affixed.

On the 16th of February, Cornelius K. Garrison and James Seligman, citizens of New York, and Thomas W. Pierce, a citizen of Massachusetts, representing themselves to be owners of $1,797,000 of the bonds secured by the third mortgage, were admitted into the suit as complainants with Ketchum, and united with him in the allegations of his bill. On the 25th of

March, 1876, Peter Marie, Frank A. Otis, Robert L. Cutting, Jr., James D. W. Cutting, citizens of the State of New York, and George R. Fearing, a citizen of Rhode Island, all stockholders in the company, asked to be made co-defendants with Thomas P. Akers, with leave to defend the suit. On the 8d of April, a receiver was appointed with the usual authority, and Vail and Fish, as trustees, were authorized to exchange the bonds secured by the third mortgage for the income and improvement bonds in accordance with the terms of the mortgage, and Akers and the county of St. Louis were given leave to file a cross-bill in thirty days. No action was taken on the petition of other stockholders to be made parties. On the 25th of April, Akers and St. Louis County filed an answer and cross-bill, in which the county of St. Louis set up a lien adverse to that of the mortgage; and both defendants alleged that the mortgage was executed in fraud of the rights of creditors and stockholders, stating particularly the defences which the company had thereto.

On the 5th of June, 1876, an adjourned term of the court was held, and all the several trustees of the prior mortgages filed answers, setting up in form their respective mortgages and stating the amounts due. Each answer concluded with the statement that the answering defendant knew of no reason why the prayer of the bill should not be granted. On the next day, Vail and Fish, as trustees, filed their answer, admitting all the allegations in the bill, and concluding as follows: "And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for the costs and expenses herein, as to your honorable court may seem meet." On the same day, Akers and St. Louis County dismissed their cross-bill and withdrew their answer without prejudice to the lien claim of the county. This being done, all the several parties appeared in court by their respective solicitors, and the court having found, among other things, the amount of income and improvement bonds of the company outstanding, and that the entire amount of the bonds secured by the third mortgage had

been issued, some, however, being still in the hands of the trustees to complete the contemplated exchanges; that Ketchum was the owner of ten of the bonds, Garrison of fourteen hundred, James Seligman of three hundred and forty-seven, and Pierce of fifty, and that the interest due Nov. 1, 1875, had not been paid, although demanded, it was, "by the consent of all parties to the suit, through their solicitors of record," adjudged and decreed "that the said Pacific Railroad do stand absolutely barred and foreclosed of and from all equity of redemption of, in, and to said mortgaged premises, property, and franchises," and that the mortgaged property, &c., be sold at public auction, subject to the liens of the several prior mortgages, by a master, who was named, to pay and satisfy the amounts due by the company upon the bonds, and any other indebtedness the court might order paid out of the proceeds, "together with the costs of suit and of said sale, including the services of said trustees, and their solicitors' and attorneys' fees in and about the management of said trust, as may hereafter be ordered by the court." Provision was also made for notice of the time and place of sale, and a conveyance to the purchaser after confirmation. The terms of sale were fixed by the decree, and if the purchase was made by or for the bondholders, all but $200,000 of the purchase-money could be paid by a surrender of bonds, provision being made for paying such of the bondholders as did not come into the purchase their *pro rata* share of the proceeds. Sixty days' time was given after the sale for all bondholders to come in and associate themselves with the purchasers, if the purchase should be made on account of the bondholders. Leave was also given the trustees of the mortgage to continue exchanges for the income and improvement bonds still outstanding. It was also ordered that nothing in the decree should be construed to prejudice in any manner the claim of St. Louis County, which had been set forth in its answer and cross-bill.

The property was sold under this decree to James Baker for the benefit of the bondholders. He had acted in the cause as solicitor of the company. On the 18th of September, a motion was made to confirm the sale. On the 22d of September, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, citizens of New York,

and George R. Fearing, a citizen of Rhode Island, stockholders in the company, filed a petition in court asking that they be made defendants in the suit, that the sale might be set aside, and that they have leave to defend, alleging the fraudulent character of the mortgage, and that the directors were acting in bad faith towards the stockholders. This motion was denied, and on the 23d of October the sale was confirmed and a conveyance to Baker, the purchaser, ordered. On the 27th of January, 1877, the Pacific Railroad took this appeal.

Mr. Matt. H. Carpenter and *Mr. N. A. Cowdrey* for the appellant.

Mr. George F. Edmunds, *Mr. James O. Broadhead*, and *Mr. Melville C. Day*, *contra.*

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

The first question with which we are met is one of jurisdiction. It is contended on the part of the appellees that a consent decree in the Circuit Court cannot be appealed from, but we do not so understand the law. Sect. 692 of the Revised Statutes provides that an appeal shall be allowed from all final decrees in the circuit courts, &c., when the matter in dispute exceeds $5,000, and that this court "shall receive, hear, and determine such appeals." This makes appeals to this court, within the prescribed limits, a matter of right, and requires us, when they are taken, to hear and decide them. If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing. We have, therefore, jurisdiction of this appeal.

This brings us at once to the inquiry whether the appellant, the Pacific Railroad, did consent to the rendition of the decree appealed from. It is stated affirmatively on the record that all parties, through their solicitors, did consent; but the appellant insists that its solicitor had no authority in that behalf. Early in the progress of the cause the company filed an answer

under its corporate seal, and signed with its authority by its secretary and solicitor of record, in which every material allegation in the bill was confessed, and it was, moreover, positively stated that the bonds sued for were in all respects valid obligations of the company and the mortgage a subsisting lien. In every instance in which the stockholders attempted to get into the case as parties, so that they might defend for the corporation, it was asserted that the directors of the company were false to their trust, and that they had either consented to, or would not resist, a decree. A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the court as a fact that the solicitor had authority to do what he did, and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained. We take a case on appeal as it comes to us in the record, and receive no new evidence. Here the record states in terms that the company assented to all that has been done. This is equivalent to an admission by the company on the record that the facts exist on which the decree rests. On an appeal, therefore, we must take all the facts as admitted, and consider only whether the case is one in which, under any state of facts, the decree could be entered. The record showing as it does affirmatively that the company gave its consent to the decree, we need not inquire what we would do if the case depended alone on the consent of the solicitor. It may be true also that under the peculiar provisions of this charter the stockholders have a sort of supervisory power over the doings of the directors; but they cannot avoid what has been done by the directors in a suit pending in a court against the company, except by the employment of such remedies as are consistent with the orderly course of judicial proceedings. They cannot correct errors arising from what has thus been done by appeal any more than the company can. If they have been defrauded, they must apply for relief in

the first instance to the court in which the fraud was perpetrated.

This disposes of all mere errors in form which are alleged against the decree. Parties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings. It was within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that if the property was bought at the sale by or for the bondholders, payment of the purchase-money might be made by a surrender of the bonds. And so of all the other provisions of the decree which are complained of. All these were matters about which the parties might properly agree; and having agreed, it does not lie with them to complain of what the court has done to give effect to their agreement. Although this appeal may have been instigated by the stockholders in opposition to the wishes of the directors, it is still the appeal of the company which was one of the parties to the agreement, and must be treated accordingly.

This leaves for our consideration under the appeal from the decree of sale only the question which was most strenuously pressed in the argument, that is to say, whether the court below had jurisdiction of the cause so as to authorize it to enter any decree. The objection is, that as Vail, Fish, Joseph Seligman, Punnett, Clark, Morgan, Murdock, and Jesse Seligman were all citizens of the same State with Ketchum and the several parties who in the progress of the cause were admitted as co-complainants with him, the suit was not between citizens of different States, and therefore not within the jurisdiction of the Circuit Court.

The first section of the act of March 3, 1875 (18 Stat., part 3, 470), provides "that the circuit courts of the United States shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute

exceeds, exclusive of costs, the sum or value of $500, . . . in which there shall be a controversy between citizens of different States. . . . "

The same general language is used in the second section of the same act in respect to the removal of suits from the State courts, and in *Removal Cases* (100 U. S. 457) we held it to mean that when the controversy about which the suit was brought was between citizens of different States, the courts of the United States might take jurisdiction without regard to the position the parties occupied in the pleadings as plaintiffs or defendants. For the purposes of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appeared that those on one side were all citizens of different States from those on the other, jurisdiction might be entertained and the cause proceeded with. That ruling, we think, applies as well to the first section as to the second.

For the purposes of this appeal we need not inquire when the Circuit Court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree when rendered was consented to, it is enough for the purposes of this appeal if the record shows that when the consent was acted on by the court jurisdiction was complete. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained.

The subject-matter of this action was the foreclosure of the third, or Vail and Fish, mortgage. As the case was made by the bill there could be no controversy, that is to say, no dispute, with any of the trustees of the earlier mortgages, because their liens were admitted and their interest had been paid in full as it matured. No relief was asked against them. All that Ketchum wanted was a foreclosure of the mortgage in which he was interested, subject to their admitted prior claims. In no possible way could their interests be injuriously affected if the facts set forth in the bill were true. To

the bill as filed and the case as afterwards made, these trustees were but nominal parties. They would be bound by what might be done, but all they could by any possibility claim was conceded.

This leaves only to consider the position occupied by Vail and Fish. When the suit was begun, as well as when the decree was rendered, they were trustees of the mortgage under which Ketchum and his co-complainants claimed. No allegations were made against them. All that was said about them was that they doubted their right to proceed. There was no antagonism between them and Ketchum and his associates. He wanted them to proceed; they did not know that they had the legal right to do so. In the mean time he, thinking his own rights, as well as those of his associate bondholders, would be injuriously affected by delay, commenced the suit to get done just what the trustees, if they had been willing to proceed, might have done. Whatever he did was for the trustees and in their behalf, and he really had no power to do more than they might have done if they had been so inclined. It is needless to inquire what might have been the result if they had seen fit to dispute the right of the complainant bondholders to go on. They did not do so, but, on the contrary, before the decree was rendered, came in and substantially availed themselves of the suit which had been begun, so that in the end the suit, in legal effect, became their suit. Although nominally defendants according to the pleadings, they voluntarily, in the course of the proceedings, arranged themselves on the same side of the subject-matter of the action with the complainants. This they had the legal right to do. After that, clearly the controversy was between citizens of one or more States on one side and citizens of other States on the other side, and when the decree was rendered the only thing to be done was to foreclose the mortgage sued on, as between the trustees of the mortgage acting with their beneficiaries and the railroad. Of such a suit the Circuit Court had jurisdiction, and its decree is, consequently, binding on the parties until set aside in the regular course of judicial proceedings.

This leaves only the question arising on the confirmation of the sale. The only objection here insisted on is that Baker,

the purchaser, was the solicitor of the appellant company. His purchase, although nominally in his own name, was actually by and for the bondholders. He was used to hold the title until the bondholders could organize and take it. While purchases at judicial sales in the name of the solicitors and attorneys of parties whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to the parties they represent. Here the company, whom Baker represented as solicitor, confessed its inability to pay the debt it owed, and consented that the property held as security be sold. In the decree which it assented to, special provision was made for a purchase by or for the bondholders. We can see no harm which will result from permitting the solicitor of the company to take the title for the bondholders under such a purchase. No complaint was made below of actual wrong. The only objection was that such a purchase was inconsistent with the duties of the solicitor. There was no speculation by the solicitor in the purchase. All he did was to hold the title until the real purchasers were in a condition to take it themselves. If there had been any proof of collusion or improper conduct on the part of the solicitor, resulting in wrong to the company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of the solicitor of one whose property is sold is necessarily in and of itself invalid. We think it is not. It will be scrutinized closely, but until impeached must stand. Slight circumstances may impeach it, but it is not under all circumstances invalid.

After a careful consideration of the whole case, we are unable to discover any error that can be corrected by appeal.

Decree affirmed.

FLEITAS v. COCKREM.

1. A statement in the record that an issue was "called for trial by the court, the jury having been waived in writing," is, in the absence of any thing to the contrary, conclusive that the requisite agreement for such a trial was made.
2. Although by the words of article 335 of the Code of Practice of Louisiana the exception of *lis pendens* is given only where the former suit is pending "before another court of competent jurisdiction," such an exception, where the former suit is pending in the same court, is within the equity of that article.
3. Where, therefore, the defendant files such an exception, — a former suit pending in the same court, — the plaintiff may be compelled to elect whether he will submit to judgment on the exception, or discontinue the former suit and pay the costs thereof.
4. The fact that the amount of an attachment bond was fixed by an order of a judge makes no difference in Louisiana as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings.
5. This court conforms to the ruling of the Supreme Court of Louisiana, that the Code of Practice requires an attachment bond to be in "a sum exceeding by one-half" the claim of the creditor.
6. In an action on a promissory note for $5,000 and interest, the defendant appeared and filed an exception of *lis pendens*. Subsequently, on a supplemental petition praying therefor, an attachment against the defendant's property was issued upon the plaintiff's entering into bond for $3,200, as prescribed by the order of the court. The court denied the motion of the defendant to set aside the attachment, upon the ground that the amount of the bond was insufficient. The property, seized under the writ, was released upon the defendant's entering into bond for $9,100. The jury found for the plaintiff the amount of the debt and interest; the court rendered judgment against the defendant therefor, "with privilege upon the property attached, and with recourse on the principal and sureties on the bond, upon which the property attached was released." *Held*, that the court erred in rendering any other than a personal judgment against the defendant.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Charles Case and *Mr. Robert Mott* for the plaintiff in error.
Mr. William Grant, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action on a promissory note for $5,000 and interest thereon at five per cent per annum from maturity, Dec. 21,

1871. Judgment was rendered for the plaintiffs with privilege upon property which was attached in the course of the proceeding, with recourse on the principal and sureties on the bond upon which the property attached was released. The defendant brought this writ of error.

It is assigned for error, first, that the issue on one of the exceptions (*lis pendens*) was tried by the court and not by a jury, no agreement to waive a trial by jury appearing in the record. The record, however, declares explicitly that "the exception in this cause was called for trial by the court, the jury having been waived in writing." In the absence of any thing to the contrary, this is conclusive that the proper agreement was made.

The next error assigned is, that after an exception had been filed by the defendant, alleging that another suit had been commenced against her for the same cause in the Sixth District Court for the parish of Orleans, and had been removed into the Circuit Court of the United States, and was still pending, the said Circuit Court allowed the plaintiffs to elect whether they would, within a time limited, discontinue that suit, which was first brought, and pay the costs of the same. The record shows that the court below did order that the plaintiffs might elect to proceed in the present suit upon paying the costs in the first suit, and discontinuing the same, otherwise the exception would be maintained. The plaintiffs did so elect, paid the costs, and discontinued the first suit. The defendant objected to this course, insisting that she was entitled, upon her exception, to have the present suit absolutely dismissed.

The exception of *lis pendens* is given by the Code of Practice, art. 335, as follows: "There are two kinds of declinatory exceptions: 1. When the exception is taken to the competency of the judge, pursuant to the rules above provided; 2. When it arises from the fact of another suit being pending between the same parties, for the same object, and growing out of the same cause of action, before another court of competent jurisdiction. In both cases the suit must be dismissed, and the plaintiff decreed to pay costs."

The former suit in the present instance not being pending

in "another court," but in the same court, the case is not within the words of the article. It has been held, however, to be within its spirit. *Dick* v. *Gilmer*, 4 La. An. 520. But in other cases, the pendency of the former suit in another court has been deemed material. *Weeks* v. *Flower*, 9 La. 385; *Succession of Ludwig*, 3 Rob. (La.) 92. And the exception is not necessarily a peremptory one in any case; for if before the trial thereof the former suit be terminated, the exception, it is said, will fail. *Schmidt* v. *Braunn*, 10 La. An. 26.

Since the exception in the case of suit pending in the same court is not within the words of the code, but rests upon its equity, and since in such cases both suits are under the control of the court in which the exception is made, we think the court might well exercise the discretion which was done in the present case, in compelling the plaintiffs to elect whether they would submit to judgment on the exception, or discontinue the first suit and pay the costs thereof.

The remaining assignments of error relate to the issue of an attachment in the case, and to the privilege given by the judgment upon the attached property, with recourse against the sureties on the bond given for its release.

The attachment was issued upon a supplemental petition filed in the case, and sworn to by one of the plaintiffs, stating the amount of the debt ($5,000 and interest thereon from Dec. 21, 1871), and that the defendant resided out of the State of Louisiana. The judge below made an order that an attachment be issued upon the plaintiffs giving bond in the sum of $3,200, with solvent surety, &c. The writ was issued, and under it the marshal, on the 11th of January, 1877, attached a plantation and sugar-house thereon, with its contents, consisting of sugar and other property sufficient to satisfy the claim; and on the 13th of January released the property by the claimant giving a bond for its release in the sum of $9,100. On the same day, the defendant entered a rule to show cause why the attachment should not be set aside, upon the ground, amongst others, that it was issued without the plaintiffs giving the bond required by law as a prerequisite therefor. This rule was subsequently dismissed by the court below, and a bill of exceptions was taken by the defendant.

The fact that the amount of an attachment bond is fixed by an order of a judge makes no difference in Louisiana as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings. *Graham* v. *Burckhalter*, 2 La. An. 415.

The question is whether the bond in this case was sufficient, being for only $3,200, when the debt exceeded $6,000. The law on the subject is based on article 245 of the Code of Practice, which is in the following words: —

"ART. 245. A creditor, his agent, or attorney in fact, praying such attachment, must, besides, annex to his petition, his obligation in favor of the defendant for a sum exceeding one-half that which he claims, with the surety of one good and solvent person residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as such defendant may recover against him in case it should be decided that the attachment was wrongfully obtained."

This law has stood in the same form in the Code of Practice since its first promulgation in 1825. But the words "for a sum exceeding one-half that which he claims" are an incorrect translation of the French copy of the code. The correct translation would be "for a sum exceeding by one-half that which he claims." And the Supreme Court of Louisiana has always construed the law as though the word "by" had been inserted, as required by the correct translation, numerous cases being reported in which judgment has been reversed because the attachment bond did not exceed by one-half the amount of the debt claimed, and no case being found to the contrary. See *Williams* v. *Barrow*, 3 La. 57; *Jackson* v. *Warwick*, 17 id. 436; *Graham* v. *Burckhalter*, 2 La. An. 415; and cases referred to in the code. It would seem that this settled construction ought to prevail. The reason for an attachment bond, as explained by the Supreme Court of Louisiana, requires the construction which was adopted. Prior to the adoption of the code, a bond for double the amount of the demand was required. "Its object, and the object of all such laws," says the court, "is to secure the absentee from all damages he may sustain by illegal seizure of his property. An interpretation such as the plaintiff contends for would in many instances defeat the purpose of

the legislature. Damage is sometimes sustained by the debtor to the whole amount of the sum claimed from him, and a bond to half that amount would only be half security." 8 La. 59.

As the law has never been changed, but stands now as it has stood for more than fifty years, and as no decision to the contrary of those referred to has ever been made, we think that we must be governed thereby.

This view receives support from the law which requires the plaintiff to give bond as a condition of arresting the person of the defendant. Originally no bond was required; but in 1856 an act was passed to amend article 214 of the code respecting process of arrest, and prescribed a bond to be given by the plaintiff "for a sum exceeding by one-half the amount of that which he claims." In this case the French copy is exactly the same as in the case of attachments.

So with regard to appeal bonds (art. 575), the Code of Practice from the first prescribed a bond "for a sum exceeding by one-half," &c.; the French being the same as in the other cases.

It is true that in 1868 an amendment of article 575 was passed changing the above words to "a sum exceeding one-half the amount." This amendment was abrogated in 1870 in the new code; but whilst it was in force a case occurred in which the court followed the altered reading, and considered a bond for "one-half the amount" sufficient. But this may have been on account of the seemingly designed alteration of the law.

No such design can be asserted in the present case. The law stands in the same words in which it has always stood, and we think it must have its long-accepted meaning.

For this cause the judgment of the Circuit Court must be reversed, so far as it gives a privilege upon the property attached, with recourse on the principal and sureties on the bond upon which the property attached was released. The rest of the judgment, not being affected by the error in question, should be affirmed. The suit was not commenced by attachment, but by citation, which was personally served upon the defendant, who appeared and filed the exception of *lis pendens* before the supplemental petition for an attachment was filed. Under

these circumstances, it would be unjust to reverse the personal judgment for the amount of the debt. We are only required to reverse that portion of it which depends upon the attachment.

The judgment is therefore affirmed, except as to the last clause thereof, which gives a "privilege upon the property attached, with recourse on the principal and sureties on the bond upon which the property attached was released;" and as to that part it is reversed with costs.

So ordered.

KETCHUM v. ST. LOUIS.

1. The act of the General Assembly of Missouri, approved Jan. 7, 1865, under which the county of St. Louis loaned its bonds to the extent of $700,000, to the Pacific Railroad Company created, on its acceptance by the company and the county, an equitable lien or charge, in favor of the county, upon the earnings of the road, to the extent necessary to meet the interest upon the bonds as it accrues. The lien continues until the bonds shall be paid.
2. All purchasers of the property of the company, or of its bonds issued under a mortgage subsequently executed, are bound to take notice of that act. Where, in a suit to foreclose such a mortgage, the road is placed under the charge of a receiver, the lien or charge in favor of the county is enforceable not only against the fund in his hands, but against the purchaser under the decree, and against whomsoever may hold the road or have the custody of its earnings.
3. Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person, whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation, binding upon the parties and all who, having notice, subsequently claim under the debtor an interest in the fund.
4. A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. Melville C. Day and *Mr. James O. Broadhead* for the appellants.

Mr. Philip Phillips, *Mr. Henry A. Clover*, *Mr. Britton A. Hill*, and *Mr. Frank J. Bowman*, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

The present appeal brings before us for examination a decree of the Circuit Court rendered April 25, 1877, adjudging that the county of St. Louis had an equitable lien or charge upon the earnings of the Pacific Railroad of Missouri, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon, to the extent of $4,000 per month, payable monthly, from the first day of April, 1876, and $1,000 payable in each month of December, to meet the interest upon $700,000 of bonds issued by the county of St. Louis in the year 1875, and by it loaned to the Pacific Railroad Company, such payments to continue until the bonds are fully paid by the company.

The decree declared the lien to exist, and to be enforceable on the railroad property and franchises, against the funds in the hands of the receiver in this suit as well as the purchaser under the mortgage foreclosure sale to be hereafter referred to.

The learned judge who heard this cause in the Circuit Court rested the decree upon the proposition of law that "if a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor."

Was there an agreement of the character indicated in this statement?

That is the first question to which we shall direct our attention.

The Pacific Railroad Company was incorporated by the legislature of Missouri in the year 1849, with power to construct a line of railway from St. Louis to Kansas City, a dis-

tance of nearly three hundred miles. For the purpose of aiding in the construction of the road, the State from time to time loaned its bonds to the company. They amounted in the year 1855 to more than $7,000,000, and were secured by a first mortgage upon the property, franchises, and income of the company, with power of sale upon default in meeting the interest and principal of the bonds. Less than two hundred miles of the road was completed at the beginning of the recent civil war, and during its continuance but little progress was made in the work of construction.

By an act approved Feb. 10, 1864, the company was authorized to borrow money "for the completion of the main road to Kansas City," and, for that purpose, to issue its bonds to the amount of $1,500,000, "to be secured by a first mortgage on the main line of the road west of Dresden," — so much of the bonds as were necessary to be applied to the completion of the road from its then terminus to Kansas City, and to no other purpose. For that object, and to that amount and extent only, the State, by the express words of the act, relinquished her first mortgage lien and right of forfeiture upon the road west of Dresden, retaining, however, a second lien and mortgage thereon, — such second lien and mortgage to become forthwith, upon the payment in full of the principal and interest of the bonds authorized by that act, the first lien and mortgage, in every respect and as fully as those held by the State.

The act created the office of fund commissioner, to be filled by appointment of the governor, subject to confirmation by the Senate. It declared that such office should "continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first-mortgage bonds of said road," as thereinafter provided. The fund commissioner became entitled, and it was made his duty, to take possession of the $1,500,000 of bonds authorized to be issued, negotiate the same, and their proceeds, together with the gross earnings of the road, from whatever source, to control and apply as directed in the act.

Without referring to other provisions of the act, it is sufficient to say that the State, through the fund commissioner, acquired,

for its security, complete control of the earnings and income arising from the property.

Following the course of events in the history of this railroad, we find that in September, 1864, the State of Missouri was invaded by insurrectionary forces, which destroyed much of the property belonging to the company, including bridges, depots, machine-shops, and track. The cost of repairing the injury thus done and of completing and putting the road in successful operation was estimated by the board of directors at the sum of $700,000. These facts were communicated to the county court of St. Louis County by a committee of the board, in a memorial, stating: "This sum we have lost as the result of the invasion. This amount we want the county to provide by issuing to the company the bonds of the county (under authority to be given by the legislature), bearing seven per cent interest, the same to be a *loan* to complete the road, the company to refund to the county the principal and interest as the same matures."

The memorial concluded in these words: "If completed, we believe that the *earnings* of the road will soon furnish all the equipments required for the increased business, pay off the $1,500,000 mortgage, provide for the payment of the county bonds now asked for, and in six or seven years commence paying on the bonds issued by the State for our benefit. But should the financial success of the enterprise not equal our expectations, the importance of the road as a great artery of trade and commerce will justify the expenditure asked for."

The justices composing the county court seem to have concurred in the propriety of the loan, but differed as to the conditions upon which it should be made. One of their number presented for adoption an order reciting the conditions which, in his judgment, should be embodied in any law authorizing bonds to be issued, viz. that the State should relinquish so much of its mortgage upon the road as covered the rolling-stock, which should then be mortgaged by the company to the county as security for the $700,000 of bonds to be issued; that the company should pay into the county treasury, at least thirty days prior to the maturity of the interest, the full amount thereof, in default of which the whole debt should become due, with power in the county to foreclose the mortgage; and, finally,

that the proposed act should be submitted for acceptance or rejection to the actual tax-payers of the county.

Another member of the county court offered as a substitute the draft of an order embodying, among other things, an act to be submitted to the legislature authorizing the proposed issue of bonds. This substitute declared that, in view of the importance of the completion of the road to the tax-payers of the county, the court would concur (in case application should be made by the company) in the propriety of the passage of an act "securing the completion of said road and the interest of the county of St. Louis in the said bonds." The proposed act contained this provision: —

"Said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad; and the fund commissioner of the Pacific Railroad Company shall pay every month $4,000, and $1,000 additional each month of December, to the treasurer of St. Louis County, to meet the interest on the above seven hundred bonds; said payments to continue until said bonds are paid by the Pacific Railroad Company."

The substitute was adopted by the county court, and, being submitted to the legislature of Missouri, that body, on the 7th of January, 1865, passed an act containing additional provisions. It is here given at length, since the case depends mainly, if not altogether, upon the construction which may be given to its provisions: —

"SECT. 1. The county court of St. Louis County is hereby authorized to issue seven hundred county bonds of the denomination of $1,000 each, having twenty years to run, and bearing interest at the rate of seven per cent per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

"SECT. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds

of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

"This act to take effect and be in force from and after its passage."

This act was accepted by the railroad company. It expressly agreed to comply with all its provisions. In conformity therewith bonds were issued by the county and delivered to the railroad company as follows: One hundred bonds on 20th February, 1875, two hundred bonds on 7th March, 1875, and four hundred bonds on 5th May, 1875. They were sold by the company, and the proceeds applied in the completion of the road to Kansas City.

On 15th of July, 1868, the company executed a first mortgage on its franchises and property for $7,000,000; on 1st of July, 1871, a second mortgage for $3,000,000; and on 10th July, 1875, a third mortgage for $4,000,000, — the latter being the same mortgage which was foreclosed by decree rendered on 6th June, 1876, in *Pacific Railroad* v. *Ketchum*, *supra*, p. 289. The decree of foreclosure and sale in that case was passed in the Circuit Court, and has been affirmed here, at the present term, but without prejudice to the lien claim of St. Louis County.

In view of these and other facts to be presently detailed, it is difficult to believe that the officers of the company had any expectation whatever that the county would make a *loan* of $700,000, without security of some sort, and upon the bare promise or covenant of a railroad corporation, staggering under an enormous indebtedness and without credit, that it would meet the interest upon the loan. We have seen that the committee appointed by the company to seek financial aid from the county expressed, officially, the belief that upon the completion of the road its *earnings* would soon furnish all the equipments required for increased business, pay off the $1,500,000 mortgage, *provide for the payment of the county bonds then asked for*, and in six or seven years thereafter commence paying on the bonds issued by the State for the benefit of the company. But

more significant as to the intention of the company and as to the impression which it sought to produce upon the county court is the fact that, immediately upon the passage of the act, the president of the railroad company, with a view, of course, to influence the action of the county court, presented to that body the written opinion of its counsel, prepared with unusual care, in which he declared: 1. That if the act should be accepted by the company, and the county should make the loan authorized, the act would be binding upon all the parties, in favor of the county court, to wit, the company, the fund commissioner, and the State. 2. That an agreement executed by the company expressing its assent to such appropriation of the earnings of the road would create in favor of the county an equitable lien or charge upon the earnings, *pro tanto*. 3. That the direct authorization of such appropriation of the earnings, or rather the direction to the fund commissioner (the trustee) to pay this monthly appropriation out of funds, to the benefit of which it (the State) was entitled, was unquestionably a waiver or postponement of the interest of the State, *cestui que trust*, in favor of the county, to the extent and for the purpose specified in the act.

"The act," said counsel, "admits of no other construction." That opinion was filed and preserved by the clerk of the county court among its records.

If the railroad company deemed it possible that the county would make a loan of $700,000 upon the simple promise of the corporation to save it harmless, — if they had not believed that the county court would exact ample security for the protection of its constituents against liability, it would scarcely have been suggested through counsel that the acceptance of the act of Jan. 7, 1865, would amount to a specific *appropriation* of so much of the earnings as would suffice to meet the interest until the bonds were paid off.

We next inquire whether any different belief was indulged by the county court. Did its members intend the loan to be made without securing the county in some effectual mode? These questions must, in view of all the circumstances, be answered in the negative. We have seen that, when the original application was made to the county court, one of the justices

submitted a proposition requiring the company to secure the loan by a mortgage upon the rolling-stock, the State to that extent surrendering its mortgage or lien. The substitute which was adopted described the act which it was proposed to submit to the legislature as an act "*securing* the completion of the road and the *interest* of the county of St. Louis in the issue of said bonds." The security which the proposed act provided was a direction to the fund commissioner to pay the amount necessary to meet the interest, and to continue such payments until the bonds were paid by the company. It is quite clear that a proposition to make this loan, without providing some security against liability, would not have been entertained by the county court.

As to the State, it is abundantly clear, from the language of the act of 1865, without reference to the circumstances under which it was passed, that the legislature, as an inducement to the county of St. Louis to come forward and save an important enterprise, in which the State was largely interested financially, intended to waive the prior statutory lien of the State to the extent necessary to secure the prompt liquidation of the interest on the proposed loan, during the whole period the bonds were outstanding and unpaid. The State, at that time, had control of the entire earnings of the railroad, and if the legislature did not intend to forego any priority or advantage then enjoyed by the State, but designed only to give authority to the county to issue its bonds, that purpose could have been accomplished by the first section of the act of 1865, leaving the county and the railroad company to make such terms and conditions as suited them.

The second section of the act shows, beyond question, that the purpose of the legislature was not so restricted, — that its intention was to provide full security to the county in the event the county court exercised the authority given by the act. The draft of the statute submitted by the county court to the legislature contained only a general direction to the fund commissioner to pay the interest, and to continue such payments until the bonds were paid off by the company. But so fixed was the legislature in the purpose to protect the county, that it extended that direction to "such person as may at any time hereafter

have the custody of the funds of the company," and, by express words, required the payments of interest, whether by the fund commissioner or by such other person, to be made "out of the earnings of said Pacific Railroad." The object of these additions to the act, as submitted by the parties, cannot be mistaken. The office of fund commissioner was created by statute, and, consequently, its continuance depended upon the will of the legislature. To meet the contingency of the abolition of that office, the same duty was imposed upon such *person* as *at any time thereafter* should have the *custody of the funds of the company.* And that there might be no misapprehension as to the source from which funds to meet the interest were to be derived, the legislature, in effect, gave the assurance that the *earnings* of the railroad, by whomsoever held, should supply the amount necessary to that end.

In this connection we may notice another important difference between the act in the form in which it was submitted to the legislature and that in which it finally passed. The former provided that the bonds should be issued "under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad." But the legislature added the words, "such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued." These last words, but for the succeeding section of the act, would have placed the county at the mercy of the railroad company, and rendered it liable to holders of bonds, whether the company complied or not with the conditions upon which the loan was made. It is manifest that while the legislature intended, by the language last quoted, to facilitate the sale of the bonds, and thereby secure the early completion of the road, it intended also by the second section of the act to assure the county of St. Louis that its absolute liability to holders of its bonds was largely nominal, since, by that section, out of the *earnings* of the property, to the extent necessary, and whether the funds of the company were in the custody of the fund commissioner or of some other person, the interest on the bonds should be paid at maturity, and such payments continued until the bonds were paid.

That the legislature intended by the act of 1865 to make a

specific *appropriation* of the earnings for that purpose; that the prior lien of the State was, to that extent, waived in favor of the county; and that such appropriation and waiver were, by agreement of all the parties then interested in the property and the disposition of its income, to continue until the bonds themselves were paid or the county discharged from liability thereon, we entertain no doubt. It was not a simple, naked covenant to pay out of a particular fund; but the act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund, — an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing. It was an arrangement, based upon a valuable consideration, which neither the State nor the company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of which all the parties to the arrangement were directly interested. To construe the act otherwise will not only do violence to plain words, requiring no construction, but convict the legislature of a deliberate design to entrap the county of St. Louis into incurring an enormous debt primarily for the benefit of the State, which controlled the earnings of the property for its own benefit.

It remains to inquire whether this agreement or arrangement can be carried into effect consistently with the settled principles of equity.

We remark that all parties claiming under mortgages executed by the company after the acceptance of the act of 1865 (none others are interested in the determination of this case) are chargeable with notice of the appropriation of earnings made by that act. "In this country," says Mr. Sedgwick, "the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community

at large." Sedgwick, Stat. and Const. Law., p. 25. That act related to matters in which the general public were concerned, and all were bound to take notice of its provisions.

We are of opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases.

In *Legard* v. *Hodges*, Lord Thurlow said: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and, therefore, this is a pure trust estate," and they must be declared trustees. 1 Ves. Jr. 478. In the report of that case in 3 Bro. C. C. 531, the Chancellor says: "I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement." Upon rehearing, the former decree was affirmed. 4 id. 422.

In Re Strand Music Hall Company (3 De G., J. & S. 147), the question arose whether that company had created a valid charge on their real property. "There can, I think," said Lord Justice Turner, "be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

The doctrine is thus stated by Mr. Justice Story in his Equity Jurisprudence, vol. ii. sect. 1231: "Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers

or have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust." The author cites, in support of these views, *Legard* v. *Hodges*, *supra*.

So, also, in *Pinch* v. *Anthony and others*, 8 Allen (Mass.), 536. "It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfil it."

In the recent work of Mr. Jones on Mortgages (vol. i. sect. 162) the author remarks: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds, and contracts, which are wanting in one or both of these characteristics of a common-law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages." So, also, in his treatise on Railroad Securities, p. 57, the same author says: "An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge." Willard, Eq. Jur. 462; *Watson* v. *The Duke of Wellington*, 1 Russ. & Myl. 602; *Yeates* v. *Groves*, 1 Ves. Jr. 279; *Lett* v. *Morris*, 4 Sim. 602; *Ex parte Alderson*, 1 Madd. 39.

Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the railroad company as security for

the loan by the county was in pursuance of a special act of the legislature; and in sustaining the decree below we give effect to the legislative will as to matters over which its authority unquestionably extended.

It will be observed that we have made no allusion to the act of March 30, 1868, subsequently to the passage of which the first, second, and third mortgages were executed. In behalf of the plaintiffs in error, it is contended that the act of 1868 shows the construction given by the Circuit Court to the act of 1865 to be inadmissible. The answer to this proposition is twofold: 1st, The act of March 30, 1868, furnishes, upon its face, evidence to all that the State felt itself under obligation to provide for the security of the county on account of the loan made to the railroad company, under the authority of the act of Jan. 7, 1865. 2d, Be that as it may, if, as we have held, the act of 1865, and its acceptance by the parties, constituted a contract by which the State waived its lien, in favor of St. Louis County, to the extent and for the purpose therein indicated, and by which the State, the railroad company, and the county appropriated the company's earnings to the payment of the interest on the county's bonds, such payments to continue until the bonds were paid off by the company, no subsequent legislation could deprive the county of the security thus acquired. Nor could parties, who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the act of 1865, destroy the equitable lien of the county, even with the consent of the railroad company. With that lien the property itself was chargeable by whomsoever it or the funds accruing therefrom are or may be held.

By an order heretofore made in this court, the city of St. Louis was allowed to intervene in this cause for the purpose of protecting such interest as it may have herein, and for the purpose of being heard at the argument. The claim of the city is, that, by the Constitution and laws of Missouri, it has assumed the position formerly occupied by the county of St. Louis under the act of Jan. 7, 1865, — that the instalments of money required by the act to be paid monthly into the county treasury are due and payable to the city treasury, and that it

has been subrogated to the rights and liabilities of the county as to all matters arising out of the issue of the bonds in question.

Since the making of that order, a written stipulation has been filed in this court signed by all the parties to the record, including the city, agreeing that in the event the decree below is affirmed, the city of St. Louis shall be substituted therein in lieu and place of the county of St. Louis. The stipulation will be entered at large upon the record, and an order entered substituting the city to all the rights acquired by the county in virtue of the decree below.

We deem it unnecessary to allude to any other points discussed by counsel. We have noticed all deemed by us material. What has been said is sufficient to dispose of the cause upon its merits.

Perceiving no error in the decree, it is, in all respects,

Affirmed.

MR. JUSTICE STRONG and MR. JUSTICE BRADLEY dissented.

MR. JUSTICE STRONG. I cannot concur in the judgment given in this case. I am unable to discover in the contract between the company and the county, or in the act of the legislature, or in both, any thing that created an equitable lien upon the earnings of the railroad company, or upon any of its property. Nothing more is expressed than a confident expectation that the earnings would prove sufficient to pay the interest on the county loan.

SMITH v. AYER.

SMITH v. NATIONAL BANK.

1. A principal is, in law, affected with notice of all facts, of which notice can be charged upon his attorney.
2. Parties who deal with an executor, exercising his power of disposition of the personal assets of the estate in his hands, to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, are bound to look into his authority, and are held to a knowledge of all the limitations which the will, as well as the law, puts thereon.
3. His sale or pledge of assets made for other purposes than the discharge of his duties as executor, will not be sustained where the purchaser or pledgee takes them with knowledge or notice of the perversion of them, or the intended perversion of their proceeds.
4. Such assets are held by him in trust to pay the debts of the testator and then to discharge legacies. Where, therefore, they are acquired from him by third parties, with knowledge of his trust and of his disregard of its obligations, they can be followed and recovered.
5. At the time of his death A. held in his name an interest in a commercial firm which he had acquired by funds belonging one-third to himself, one-third to the children of a deceased brother, and one-third to a sister. In his will, of which B., his brother, was appointed executor, A. made a request that the whole of such interest should be retained in the firm, under the control of B., so long as the latter should deem it profitable. His own interest he bequeathed to B., in trust for the latter and certain nephews and nieces, in equal proportions, to be held and controlled by B. so long as he should deem it advisable. One of the members of the firm having withdrawn therefrom, B. purchased his interest, whereupon the firm name was changed. Subsequently, to raise funds wherewith to pay loans made to the firm, B. pledged to C. certain notes which had come into his possession as executor. *Held*, 1. That, assuming the identity of the firm remained after the change of its members and name, the authority of B., as executor, to continue a specifically designated existing interest in the firm did not extend to the use in its business of any other funds or property of the estate. 2. That his use of the notes to raise funds for the firm was a misappropriation of them, and that C., having knowledge of the directions of the testator, cannot hold them against the claim of his representatives.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

The first case was argued by *Mr. H. G. Miller* and *Mr. T. G. Frost* for the appellants, and by *Mr. W. C. Goudy* for the appellees.

The second case was argued by *Mr. H. G. Miller*, *Mr. T. G. Frost*, and *Mr. P. C. Smith* for the appellants, and by *Mr. C. C. Bonney* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

These are suits in equity to compel the delivery to the complainants of two promissory notes, each for $39,250, alleged to belong to the estate of Renick Huston, deceased, brought by the administrators *de bonis non* of that estate and the administrator *de bonis non* of the estate of Thomas T. Renick, deceased. They were commenced in a court of the State of Illinois, and upon application of the defendants, Ayer *et al.*, in the first case, and of the First National Bank of Westboro', Mass., in the second case, were transferred to the Circuit Court of the United States for the Northern District of Illinois. That court dismissed the bill in both cases, and from its decrees they are brought here on appeal.

The facts out of which the suits arise are substantially these: In February, 1864, one Renick Huston, then a resident of Ohio, died possessed of a tract of land, about eighty acres in extent, near Chicago, Ill. The legal title to the land stood in the name of Job R. Renick, but it is admitted that he held it as trustee for the estate of Huston, and to reimburse Thomas T. Renick for certain expenditures incurred on account of the property. The deceased left a will, by which, after making certain bequests, he devised one-third of the residue of his estate to Thomas T. Renick, whom he named as his executor, and to whom letters testamentary were issued. The property having been sold at different times for taxes, and being subject to various charges, Renick advanced money to a large amount, stated to be between twenty and thirty thousand dollars, to redeem it from the sales, and to pay off the claims upon it. He was authorized under the will to sell the real estate, and accordingly, in July, 1872, he sold it to one Joel D. Harvey for $157,000, payable one-fourth in cash and the balance in one, two, and three years, for which notes were given, secured by a trust-deed of the property executed to one J. Edwards Fay. There were six notes in all, three being each for $39,250, and the other three for the instalments of interest as they fell

due. They were all made payable to the order of Thomas T. Renick individually. The cash payment was sufficient to reimburse him for his outlays, and he held the notes as executor of Huston's estate.

In August, 1873, Thomas T. Renick died in Ohio, leaving a will, and appointing his brother Benjamin executor of his estate. Letters testamentary were accordingly issued to Benjamin, and the notes of Harvey subsequently came into his possession as executor. At the time of his death the deceased held in his name an interest in a commercial firm, known as Tower, Classen, & Co., engaged in the manufacture and sale of chromatic printing-presses, at Canton, Ohio, which he had acquired by funds belonging one-third to himself, one-third to the children of a deceased brother, and one-third to a sister. In his will he made a request that the whole interest should be retained in the company, under the control of his brother, so long as the latter should deem it profitable. His own interest he bequeathed to his brother in trust for himself and certain nephews and nieces mentioned, in equal proportions, to be held and controlled by him so long as he should deem it advisable. Several other bequests were made by the testator to different parties, and the payment of an annuity to one of his brothers was directed. Soon afterwards Benjamin purchased the interest of Tower in the company, and then the firm name was changed to that of B. T. Renick & Co.

In September, 1873, the complainants, Palmer C. Smith and Job R. Renick, were appointed administrators *de bonis non* with the will annexed of the estate of Huston. And when the second note of Harvey was about maturing, application was made to Smith, as such administrator, to consent to extend the time of its payment and that of the third note. After some negotiation, and the maturity of one of the notes, Smith signed an agreement, in which, after reciting that the notes were the property of the estate of Renick Huston, deceased; that a suit was pending in Ohio affecting the property of the estate, and that until its termination it was desirable that the money should be invested; and that other parties — the West Chicago Land Company, to which portions of the real property had been sold — had assumed the payment of the notes and interest, he stipu-

lated not to press the payment of the notes until such time as he should require the money by reason of the termination of the suit, the extension in no event to exceed two years. This agreement bears date Sept. 12, 1874. The parties who had assumed the obligation to pay the notes were not content with the agreement without the signature of Benjamin Renick, executor of the estate of Thomas Renick, as the notes were in his possession and were payable to the order of his testator. After a good deal of negotiation, his signature, as executor of the estate of Thomas Renick, was obtained to a similar agreement for an extension of time, stipulating that he also would not press the payment of the notes unless he should require the money to make a settlement of that estate. It does not, however, contain the recital of the one signed by Smith, that the notes were the property of the estate of Huston. This agreement was not executed until the 19th of February, 1875, though it was dated back to the date of the one signed by Smith, and both agreements were placed in the hands of one James R. Goodman. On the same day the following indorsement was made on each of the notes: —

"FEB. 19, 1879.

"Payment of the within notes extended, as per contract of Sept. 12, 1874, now in the hands of James R. Goodman, Esq., for a period not exceeding two years from July 15, 1874.

"J. EDWARDS FAY, *Trustee, &c.*

"B. T. RENICK,

"Executor and Trustee of Thomas T. Renick, deceased."

In May following, the firm of B. T. Renick & Co., the successors, as mentioned, of Tower, Classen, & Co., applied, through a broker in New York, to the defendants, J. C. Ayer & Co., of Lowell, Mass., for a loan of $39,250, and offered to pledge as collateral security for the money one of the notes of Joel A. Harvey, given upon the purchase of the land near Chicago, and secured by a trust-deed of the property. Ayer & Co. agreed to make the loan if the security was approved by their attorney, to whom it was referred to examine and report as to its sufficiency. The attorney made the examination. He testifies that he examined the two notes of Harvey and the deed of trust securing them, an abstract of title to the land, and a copy of the

will of Thomas T. Renick; that he talked with the trustee under the trust-deed, and with Benjamin Renick, the executor of Thomas T. Renick, in whose possession the notes were at the time; that Benjamin informed him that he wished to use the money borrowed in the business of B. T. Renick & Co., manufacturers of chromatic printing-presses; that the establishment was the one designated in the will as that of Tower, Classen, & Co.; and that the notes had each the indorsement of the extension mentioned. The attorney reported to Ayer & Co. that the security was valid and sufficient to pay the notes, and advised them to take the note first maturing. Immediately afterwards he was directed to complete the loan. He accordingly took the note of B. T. Renick & Co. for $39,250, dated May 26, 1875, payable to Ayer & Co., at their office in Lowell, Mass., and, as collateral security, received the note first falling due of Harvey for the same amount, both of which he transmitted to Ayer & Co. It is to compel a surrender of this note to the complainants that the first of the above-named suits is brought.

In June following this transaction, the firm of B. T. Renick & Co. desired a further loan of $30,000, and employed J. Edwards Fay to obtain it on the security of the third note of Harvey for $39,250. Fay applied to the First National Bank of Westboro', Mass., for the loan. He showed to its officers the note of Harvey, having the indorsement extending the time of payment for a period not exceeding two years, pursuant to the agreement deposited with Goodman, and informed them of the trust-deed executed to him to secure its payment. The indorsement, as already seen, showed that the note was held by B. T. Renick as executor. He also told them of the loan made by Ayer & Co. upon the security of the second note, the examination then made by their attorney into the sufficiency of the security and his favorable report. He also mentioned the relation which Benjamin Renick, as executor of Thomas T. Renick, deceased, bore to the firm of B. T. Renick & Co., and that he made the application for the loan at the request of that firm. The bank thereupon agreed to make the loan. A note of B. T. Renick & Co., for $30,000, dated June 1, 1875, payable on the 15th of July, 1876, was accordingly executed and delivered to it, with the note of Harvey as collateral security, and the money

received. It is to compel a surrender to the complainants of the note thus pledged as collateral that the second of the above suits is brought. Soon after the bills were filed, Benjamin Renick resigned his position as executor of the estate of Thomas T. Renick, and Edward J. Van Meter was appointed in his place as administrator *de bonis non* with the will annexed, and by leave of the court a supplemental bill was filed in both cases, and he was allowed to appear in each as a co-complainant and join in the prayer for relief.

There is no question as to the actual ownership of the notes of Harvey taken by Ayer & Co. and the First National Bank of Westboro'. They belong to the estate of Renick Huston. The only interest which Thomas T. Renick had in them grew out of his relations to that estate for advances and services and as a residuary legatee. The question for determination is whether Ayer & Co. and the bank took the notes under such circumstances as to be able to hold them or either of them against the demand of Huston's estate, or of that of the estate of Thomas T. Renick, from whose executor they were received. So far as the present suits are concerned, it is of no consequence to the defendants whether the notes be regarded ultimately as the property of the estate of Huston or of the estate of Thomas T. Renick. They can only insist that, as in their negotiations they knew nothing of the claims of Huston's estate, and dealt with the notes as the property of Renick's estate, they shall be entitled to all the protection which that fact may confer. We shall so treat the cases and consider their rights. There is no doubt that Ayer & Co. relied entirely upon the judgment of their attorney as to the power of the executor of the estate of Thomas T. Renick to pledge the note for moneys borrowed to be used in the business of the firm of B. T. Renick & Co. Still they must be held to know the law, and the limitations which it prescribes to the powers of executors in the disposition of property coming into their hands as such officers; and, however free from intentional wrong, they must bear the responsibility of a mistaken judgment with respect to those limitations. The facts brought to the knowledge of their attorney in his inquiries respecting the note and the authority of Benjamin T. Renick to pledge it are considered in law as brought to their knowledge.

Information to him of all essential matters affecting the subject he was investigating was in law information to them, and their action must be adjudged accordingly. The law, indeed, goes much further than this: it considers the principal as affected with notice of all facts, notice of which can be charged upon the attorney. Here the attorney examined the will of Thomas T. Renick; he knew that the note in question was held by Benjamin T. Renick in his character as executor of Thomas' estate, and not in his own right; the agreement referred to in its indorsement of extension of time of payment made him acquainted with that fact. It stipulated not to press for payment of the note until the money was required for the settlement of that estate; and he was informed beforehand that the money to be borrowed on the pledge of the note in question as security was to be used in the business of B. T. Renick & Co.

The Bank of Westboro' had no attorney of its own in the transaction. It relied upon the representations of the attorney of B. T. Renick & Co., employed to negotiate the loan. He informed the bank, however, of all facts essential to its knowledge, or acquainted it with such matters as upon inquiry would have given the information. It knew that the note was held by B. T. Renick as assets of Thomas T. Renick's estate, and not in his own right; it was so informed by the attorney; the indorsement on the note declared the fact also; and the agreement to which the indorsement referred, and to which its attention was called, would have removed all doubt on the subject, if any could have existed. It must be presumed to have known what it could thus easily have ascertained; and, dealing with an executor exercising his power of disposition of the personal assets of an estate in his hands, ostensibly to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, it was bound to look into his authority to make such a disposition of them, and is held to a knowledge of all the limitations which the will as well as the law put upon his power.

There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is

made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds. The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies; and, as in all other cases of trust, he is personally responsible for any breach of duty. And property thus held, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril.

The adjudications in support of this doctrine are very numerous. The doctrine pervades the whole law of trusts. In *Colt* v. *Lasnier*, reported in 9th Cowen, Chief Justice Savage, of the Supreme Court of New York, after reviewing the cases, concludes that the correct rule both in England and in that State is, "That any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor, and that such person is responsible for the property thus received, either as purchaser or pledgee." And so in many cases it has been held that the payment by the executor of his own private debt with the assets of the testator is a *devastavit;* that is, a wasting of the estate. There are, indeed, some exceptions to this, as where the executor has paid debts of the testator with his own money to the value of the assets used. But, beyond a few exceptions of this kind, such a use of the assets is considered entirely indefensible, and the party receiving them will not be permitted to retain them, on the ground that the

transaction itself gives him notice of their misapplication, and thus necessarily involves him as a participator in the fraud. And the doctrine is supported by many authorities that where a party has reasonable grounds for believing that an executor intends to misapply them, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction. In the case of *Miller* v. *Williamson*, the Court of Appeals of Maryland held that the fact that the executor made an assignment of such assets to secure a debt owing to parties by a mercantile firm of which he was a member, was sufficient, in contemplation of law, to notify them that he was about to commit a *devastavit*. 5 Md. 219. And where an administrator had assigned promissory notes of the estate in his hands for goods for his own use, the Supreme Court of Indiana held that it was a waste of the assets; and that if the assignee had knowledge, even from the nature of the transaction, that the administrator was thus acting in violation of his trust, the right of property in the notes was not divested, and he could not hold the notes or profit by such assignment as against those rightfully entitled to them. *Thomasson, Admr.*, v. *Brown*, 43 Ind. 203. See also *Field* v. *Schieffelin*, 7 Johns. (N. Y.) Ch. 150, and *Petrie* v. *Clark*, 11 Serg. & R. (Pa.) 377.

In the cases at bar, the defendants Ayer & Co. and the directors of the bank knew that the pledging of the assets of the estate, of which Benjamin T. Renick was executor, to secure a loan for the business of a commercial house, was a misuse of them, unless, indeed, the will of his testator authorized it. The law imputed such knowledge to them. They could not say that such assets could be rightfully used as collateral security for loans to be employed in the business of a commercial house. It would be attributing to them the lack of ordinary good sense to suppose they entertained any such notion. The question then arises, whether the will of Thomas T. Renick authorized the assets of his estate, or the moneys to be raised upon them, to be used in the business of B. T. Renick & Co.

In that will the testator mentions a certain interest in the firm of Tower, Classen, & Co., acquired by funds belonging to him, a sister, and the children of a deceased brother, and he desired that such interest should be continued in the firm, under

the control of his brother, so long as the latter should deem it profitable; and that his own share should be retained in like manner for certain parties, so long as he should deem it advisable; and he bequeathed it to him as trustee for that purpose. It did not authorize the use of any of the general assets of the testator in that business, or the borrowing of money on its account. It may, indeed, be doubted whether the new firm of B. T. Renick & Co. can be considered as the same firm as Tower, Classen, & Co. The change of the old firm by Tower's withdrawal may have taken from it the person upon whose judgment alone the testator relied for a wise management of its business. We cannot say that a confidence reposed in the firm which existed when the will was made would have been extended to another firm consisting of different associates. But, assuming that its identity remained after the change of members and name, it is perfectly clear that the authority of the executor to continue a specifically designated existing interest in the firm did not extend to the use in its business of any other funds of the estate, or to the use of any property which he received in his official character, to raise funds for that purpose. In *Burwell* v. *Mandeville's Executors*, reported in 2d Howard, this doctrine is stated by this court with great distinctness. There the testator and one Cawood had been partners, and in his will the testator desired that his interest in the partnership should be continued until the expiration of the term limited by the articles between them, the business to be continued by his partner, and the profit and loss to be distributed in the manner there provided. After his death, his partner carried on the business of the partnership, but failed before the expiration of the stipulated term; and the object of the suit was to reach the general assets of the estate of the testator to pay certain debts of the firm contracted after his decease. It was held that the general assets were not thus liable. The court observed that it was competent for partners to provide by agreement for the continuance of the partnership after the death of one of them; or for one partner by his will to provide for the continuance of the partnership after his death, and if it was consented to by the surviving partner, it would become obligatory. "But then," continues the court,

speaking through Mr. Justice Story, "in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds; and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress. A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner, or executor, or other persons carrying on the trade may be personally responsible for all the debts contracted." And after citing several authorities from the English reports in support of these positions, the learned justice remarks, "That nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without, in effect, saying at the same time that the payments may all be recalled if the trade should become unsuccessful or ruinous." *Ex parte Garland*, 10 Ves. Jr. 109; *Ex parte Richardson, &c.*, 3 Madd. 79; *Pitkin* v. *Pitkin*, 7 Conn. 306; *Lucht, Adm'r*, v. *Behrens*, 28 Ohio St. 231.

According to the doctrine of this case, — and many others to the same purport might be cited, — there is no authority in the will of Thomas T. Renick justifying the use of the general assets of his estate in the business of B. T. Renick & Co., even if this firm be identical with that of Tower, Classen, & Co. Applying the notes of Harvey held by his executor, or using them to obtain money for that purpose, was a misappropriation

of them, as much so as if they had been used for any other private business. The parties receiving them, knowing of the directions of the testator, cannot hold them against the claim of his representatives. The resignation of the executor who connived at this misappropriation having been accepted, and the administrator *de bonis non* with the will annexed having been appointed in his place, there is no objection to the prosecution of the suits in the latter's name, in conjunction with the representatives of Huston's estate, to compel the restoration of the notes. And as the notes in fact belong to the estate of Huston, the administrators *de bonis non* of that estate may insist that, when they are returned by Ayer & Co. and the National Bank of Westboro', they shall be delivered over to them.

In what we have thus said of the misappropriation of the notes, we have assumed that they belonged to the estate of Thomas T. Renick; for the defendants Ayer & Co. and the Bank of Westboro' contend that they had a right to so treat them, as they were in the possession of his executor, claiming them as part of the assets of his testator. But the want of authority on the part of the executor to pledge them is only the more marked from the fact that his testator only held them as executor for another estate, although that fact has not been allowed to affect the defence.

The decree in each case must, therefore, be reversed, and the court below directed to enter a decree, in the first case, that the defendants, Ayer & Co., surrender the note of Harvey taken by them to the complainants, the administrators *de bonis non* of the estate of Renick Huston; and that a like decree be entered in the second case against the First National Bank of Westboro', to surrender to the same complainants the other note of Harvey held by it, and that all other parties be enjoined from interfering with their collection of the said notes; and it is

So ordered.

NOTE. — A petition for a rehearing in the first case, and for a modification of the decree in the second case, having been filed, at a subsequent day of the term,

MR. JUSTICE FIELD delivered the opinion of the court.

The petition for a rehearing in the first case, and the petition for a modification of the decree in the second case, are both denied. The pledging of the notes

of Harvey, belonging to the estate of Renick Huston, or to the estate of Thomas T. Renick, — and for the purposes of these suits it matters not to which, as the representatives of both estates are parties complainant, — as security for moneys borrowed for the use of a mercantile firm, was a plain misappropriation of the property of one of the estates. Our decree was that the notes should be returned to the representative of the estate from which it was wrongfully taken. The defendants retain their claims against the firm of B. T. Renick & Co., on its notes, and can prosecute them before the ordinary tribunals; and if any members of the firm have interests in the estate of Renick Huston, or of other deceased parties, they can seek to subject those interests to the payment of the claims without prejudice from our decree in these cases.

Petitions denied.

WATER-METER COMPANY *v.* DESPER.

1. While letters-patent for a combination are not infringed if a material part of it is omitted, yet if a part which is only formally omitted is supplied by a mechanical equivalent performing the same office and producing the same result, they are infringed.
2. The courts in this country cannot declare that any one of the elements entering into such a combination is immaterial. They can only decide whether a part omitted by the alleged infringer is supplied by an equivalent device.
3. Reissued letters-patent No. 5806, granted March 24, 1874, being a reissue of original letters No. 109,372 granted Nov. 22, 1870, to Phinehas Ball, and Benaiah Fitts, for an improvement in liquid meters, are not infringed by letters-patent No. 144,747, granted Nov. 18, 1873, to Henry A. Desper, for an improvement in fluid meters.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. Andrew McCallum for the appellant.
Mr. J. E. Maynadier, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a bill in equity filed by the Union Water-Meter Company, the appellant, to restrain the infringement of a patent and for an account of profits and damages. The letters-patent alleged to be infringed are reissued letters No. 5806, being a reissue of original letters-patent No. 109,372, granted 22d

November, 1870, to Phinehas Ball and Benaiah Fitts for certain improvements in water-meters; the reissue being made to the complainant as assignee, on the 24th of March, 1874. The defendants, by their answer, deny that the reissued patent was for the same invention described in the original; aver that the invention claimed was covered by another patent granted 20th July, 1869, to the same patentees, Ball and Fitts; deny that they were the first and original inventors of the alleged improvement, specifying various older patents in which, as they allege, it was described, and divers persons who had known and used it; deny infringement; and aver that all water-meters made by the defendants are constructed according to letters-patent No. 144,747, granted 18th November, 1873, to Henry A. Desper, one of the defendants, except in the omission of a certain adjusting screw.

The water-meter which is the subject of the patent consists of two parallel horizontal cylinders, each traversed by two pistons, connected together by a connecting-rod of such length that when one piston is at one end of the cylinder the other is at a sufficient distance from the other end, to leave the requisite space to be filled with the quantity of water to be measured at each stroke. This water being discharged, the pistons are made to traverse the cylinder and allow the opposite end to be filled with water, and discharged in like manner. By this reciprocating motion of the pistons, regulated quantities of water are constantly received and discharged into and out of the two ends of the cylinder alternately. The pressure of the water from the source of supply, admitted by means of proper valves, gives to the pistons this reciprocating motion. The valve gear between the two parallel cylinders is so arranged as to cause the pistons in one cylinder to move in an opposite direction from those in the other. A rotary valve is used for both cylinders, situated between and below them, being circular, or funnel-shaped, having holes, or ports, in its side for the induction and eduction of the water into and out of the cylinders, and being crowned with a bevel-gear to give it a circular motion. Across and over the valve, extending from one piston-rod to the other, is placed a shaft, having a crank at each end, and a bevel pinion near one of the cranks, meshing into the

bevel-gear of the valve; the two cranks are arranged at right angles with each other, and each has a crank-pin which is inserted in a slot made in the centre of the piston-rod with which it is connected, — the side of the cylinder being removed, or open, between the end portions that receive the water. The slot which receives the crank-pin is perpendicular, and at right angles with the length of the piston-rod, and is wider than the diameter of the pin, and enlarged in the middle in order to give the pin room, and allow the crank to turn freely over after the piston has been stopped. The pistons are prevented from coming into contact with the ends of the cylinders by means of adjusting stops, slightly projecting therefrom inside. Projecting stops for arresting the movement of the pistons, and much of the mechanical arrangement between the crank-shaft and the slots in the piston-rods, used for giving the proper motion to the crank-shaft, are to be found described in a patent granted to Mr. Ericsson in 1851 for a water-meter having slide valves instead of a rotary valve, but in which a rotary motion was communicated to the indicator.

The patent in question does not cover any of the separate parts of the meter, it being conceded that these were all known and used before the application for the patent. The claim relied on by the complainant is for a combination only, being the fourth claim in the reissued patent, which is in the following words: —

"4. The combination in a liquid meter of the following instrumentalities, to wit, a rotary valve, *g*, provided with suitable ports or openings, through which the liquid to be measured can be supplied to the meter and discharged therefrom; two cylinders, *b* and *b'*, for the reception and measurement of the liquid; the double-acting pistons, *c* and *c'*, each carrying a rod, *d*, and each of these provided with a single cam-slot, *e*, arranged as described, and of a width greater than the diameter of the wrist *n* of the crank-shaft, so as to permit of the adjustment of the pistons, that they may discharge at each stroke, as nearly as possible, the exact quantity of water required of them, and so as to allow each of the crank-wrists *n* freely to pass its dead-centre after its own piston has ceased to act on it; adjusting stops, *o*, by means of which the adjustment of the length of the stroke of the pistons at either end is effected;

and, lastly, a crank-shaft, *i*, through which motion from the pistons is imparted to the valves, the whole operating in the manner substantially as described."

The combination here claimed consists of five parts or elements, viz.: 1st, the rotary valve; 2d, the two cylinders; 3d, the double-acting pistons, connected by a rod having a cam-slot at right angles with the length of the rod; 4th, the adjusting stops; 5th, the crank-shaft with its pinion, and cranks, by means of which rotary motion is imparted from the pistons to the valve. The rotary valve, and the combination of the cylinders, piston-rods, crank-shaft, and rotary valve were the subjects of a previous patent granted to Ball and Fitts on the 20th of July, 1869. The only additional elements in the present patent are the adjusting stops and the rectangular position of the slots in the piston-rods.

It is a well-known doctrine of patent law, that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known that if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office and producing the same result, the patent is infringed.

The first question, therefore, is, whether the defendants infringe the claim referred to, — whether they do, in fact, in their water-meters, use all the parts of the combination above specified.

The meter manufactured by the defendants is different in several respects from that described in the complainant's patent. It has a rotary valve like the latter, but without any bevel-gear; it also has two cylinders, with an immaterial difference of position, being placed at right angles with each other instead of being parallel; each cylinder is likewise provided with two double-acting pistons, connected by a piston-rod, the same as in the complainant's meter; the cylinder-heads are also furnished with Ericsson's stops projecting inside for arresting the movement of the pistons, though these stops are fixed and not adjustable. But the meter of the defendant's has no crank-shaft, and no semblance of a crank-shaft, for imparting motion from the pistons to the rotary valve; on the contrary, their valve is connected directly with the piston-rods in the follow-

ing manner: The piston-rods cross each other at right angles, having transverse slots, and being halved together, one lying immediately on the other, so that the axes of the pistons are in the same plane. The valve below is connected directly with the piston-rods by a single crank which is keyed on to its upper solid stem, and has a crank-pin which works in the two slots of the respective piston-rods. Thus arranged, the successive reciprocating movements of the two double pistons impart a circular motion to the valve, which, by duly arranged induction and eduction ports, alternately fills and empties the respective cylinders.

From this it appears that, in the construction of defendants' meter, the crank-shaft, with its two cranks, pinion, and gearing connection (which is an essential feature of the complainant's meter), is altogether dispensed with. The defendants effect the desired result of communicating rotary motion to the valve without any such shaft, or any thing equivalent thereto. The entire part, with all its appurtenances, is thrown out of their machine. They use a crank, it is true; but it is attached directly to the rotary valve, and is a part of it. The use of a crank in converting reciprocating into rotary motion is an old device. It was applied to the steam-engine a century ago, and has been applied to hundreds of different machines since that time. Ball and Fitts had no claim to it, but only to the particular method and device by which they employed it, in combination with the various other parts of their meter. Instead of the crank-shaft, had they in their patented combination claimed every method, and all methods, of communicating motion from the piston-rods to the rotary valve by means of a crank, the defendants' meter would have been an infringement. But such a claim might not have been valid. At all events, it was not allowed.

The specification was evidently drawn with great care, and it is to be presumed that the patentees claimed all that the Patent Office considered them entitled to. We cannot say that the crank-shaft was an immaterial part of their combination. The patent, as it stands, occupies very narrow ground. It requires the presence of every one of the elements specified in the combination secured by it. We think that the defendants

do not use all of these elements, but that they dispense with one of them at least which is material in the complainant's meter. Our conclusion, therefore, is, that they do not infringe the complainant's patent.

It may be observed, before concluding this opinion, that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent. We think no such equivalent is supplied in this case. The general construction of the defendants' meter, and the arrangement of its parts, are so different from that described in the complainant's patent, and claimed therein, that the defendants are enabled to dispense with the entire part referred to.

Decree affirmed.

RAILROAD COMPANY *v.* TENNESSEE.

The Constitution of Tennessee, in force in 1838, declares that "suits may be brought against the State in such manner and in such courts as the legislature may by law direct." The statute of 1865 providing that actions might be instituted against the State under the same rules and regulations that govern those between private citizens, but conferring no power on the courts to execute their judgments, was repealed in 1865. No other law was enacted prescribing the manner or the courts in which the State could be sued. In a suit subsequently brought by the State in 1872 against the Bank of Tennessee and certain of its creditors, A., who was admitted a defendant, filed a cross-bill, setting up that while the first statute was in force the bank became indebted to him, and, praying that under the indemnity clause of its charter a decree be rendered against the State for the amount of the debt. The cross-bill was dismissed solely upon the ground that the State could not be sued in her own courts. *Held*, that the repealing statute of 1865 did not impair the obligation of a contract, within the meaning of the contract clause of the Constitution of the United States.

ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

Submitted on printed briefs by *Mr. Benjamin J. Lea*, Attorney-General of Tennessee, and *Mr. J. B. Heiskell*, for the State; and by *Mr. George Hoadly* and *Mr. E. L. Andrews*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 19th of January, 1838, the State of Tennessee established a bank in its own name and for its own benefit, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. The State was the only stockholder, and entitled to all the profits of the business. The bank was by its charter capable of suing and being sued. At that time the Constitution of the State contained this provision: "Suits may be brought against the State in such manner and in such courts as the legislature may by law direct." Art. 1, sect. 17. No law had then been passed giving effect to this express grant of power, but in 1855 it was enacted that actions might be instituted against the State under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. Code, sect. 2807. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the legislature.

In 1865, this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the State. On the 16th of February, 1866, an act was passed to wind up and settle the affairs of the bank, under which an assignment of all the property was made to Samuel Watson, trustee. Afterwards, on the 16th of May, 1866, the State and the trustee filed a bill in equity, in the Chancery Court at Nashville, against the bank and its creditors, for an account of debts and assets and a decree of distribution. At the November Term, 1872, of the court, the Memphis and Charlestown Railroad Company was admitted as a defendant to this suit, and given leave to file a cross-bill. This cross-bill

was accordingly filed, and set forth an indebtedness from the bank to the railroad company, which accrued while the law allowing suits against the State was in existence, and sought to enforce the liability of the State under the indemnity clause of the charter. To this bill both the State and Watson, the trustee, demurred, and assigned for cause, among others, that the State could not be sued. The demurrer was sustained by the Chancery Court, and the cross-bill dismissed. An appeal was then taken to the Supreme Court of the State, where the decree below was affirmed, upon the express ground that the repeal of the law authorizing suits against the State was valid, and did not impair the obligation of the contract which the railroad company had. All other questions were waived by the court, and the decision placed entirely on the ground that as the State could not be sued in its own courts, the bill must be dismissed. To reverse that judgment this writ of error was brought.

The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the

right is no more available afterwards than before. The Constitution preserves only such remedies as are required to *enforce* a contract.

Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfilment. The courts are powerless. Every thing after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty.

It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given. This renders it unnecessary to consider whether in this suit a cross-bill could have been maintained by the railroad company if the right to sue had been continued, and also whether a remedy given after the charter of the bank was granted, but in force when the debt of the bank was incurred, might be taken away without impairing the obligation of the contract of the State to indemnify the creditors against loss by reason of any deficiency in the capital. Neither do we find it necessary to determine what would be a complete judicial remedy against a State, nor whether, if such a remedy had been given, the obligation of a contract entered into by the State when it was in existence

would be impaired by taking it away. What we do decide is that no such remedy was given in this case.

Judgment affirmed.

MR. JUSTICE SWAYNE and MR. JUSTICE STRONG dissented.

LANGFORD v. UNITED STATES.

1. As applicable to the government or any of its officers, the maxim that the king can do no wrong has no place in our system of constitutional law.
2. *Quære*, where lands which are confessedly private property are by the express authority of the government taken for public use, can the just compensation therefor which is guaranteed by the Constitution be recovered under existing laws in the Court of Claims?
3. That court has jurisdiction only in cases *ex contractu*, and an implied contract to pay does not arise where the officer of the government, asserting its ownership, commits a tort by taking forcible possession of the lands of an individual for public use.
4. The provision restricting that jurisdiction to contracts express or implied refers to the well-understood distinction between matters *ex contractu* and those *ex delicto*, and is founded on the principle, that while Congress is willing to subject the government to suits on contracts, which can be valid only when made by some one thereunto vested with authority, or when under such authority something is by him done which raises an implied contract, that body did not intend to make the government liable to suit for the wrongful and unauthorized acts which are committed by its officers, under a mistaken zeal for the public good.
5. If, under claim that they belong to the government, an officer seizes for the use of an Indian agency buildings owned by a private citizen, no implied obligation of the United States to pay for the use and occupation of them is thereby raised.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Benjamin F. Butler and *Mr. Thomas Wilson* for the appellant.

The Attorney-General for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

This suit was brought by the plaintiff against the United States to recover for the use and occupation of certain lands

and buildings. The judgment of the Court of Claims was rendered against him, and he appealed here.

The first question arising in this case concerns the jurisdiction of the Court of Claims upon the suggestion of the Attorney-General that the claim is not founded on contract, either express or implied. That court could have no cognizance of the case on any other ground, according to the express language of the statute defining its jurisdiction. Rev. Stat., sect. 1059.

The findings of the court leave no doubt that the Indian agents acting for the United States, and without the consent of the American Board of Commissioners for Foreign Missions, took possession of the buildings which that board had erected upon the lands, and have since retained them by force and against its will or that of Langford, who claims title under it. The United States always asserted that their possession was by virtue of their own title, which was hostile to that of the claimant. The military of the United States was at one time ordered to protect by force the occupation of the agents.

Conceding that the title, or even the right to the possession of the premises, was in claimant, it would seem that the facts above stated show that the act of the United States in taking and holding that possession was an unequivocal tort, if the government can be capable of committing one, and that if the case were between individuals every implication of a contract would be repelled.

Counsel for claimant, admitting this to be true, makes a very ingenious argument to prove that the government, in taking and using the property of an individual against his consent, and by force, cannot be guilty of a tort, because the nature of the relation of the government to its citizens, and the provisions of the Constitution, create an implied obligation to pay for property, or for the use of property, so taken. The argument rests on two distinct propositions: 1. That the maxim of English constitutional law, that the king can do no wrong, is one which the courts must apply to the government of the United States, and that therefore there can be no tort committed by the government. 2. That by virtue of the constitutional provision that private property shall not be taken for public use, without

just compensation, there arises in all cases where such property is so taken an implied obligation to pay for it.

It is not easy to see how the first proposition can have any place in our system of government.

We have no king to whom it can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English government than any other branch of our government, and is the only *individual* to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty. None of the eminent counsel who defended President Johnson on his impeachment trial asserted that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the king, be imputed to him, but must be laid to the charge of the ministers who advised him.

It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offence.

We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim has an existence in this country.

The other point is one which requires more delicate handling.

We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house, or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.

It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the

government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

What is pertinent to the present case is that, conceding that principle, it does not confer on that court the authority to decide that the United States, in asserting the right to use its *own* property, is using that of an *individual*, and in taking possession of such property under claim of title, and retaining it by force against an opposing claimant, has come under an implied contract to pay him for the use of the property. In the first case, the government admits the title of the individual and his right to compensation. This right to compensation follows from the two propositions, that it was private property and was taken for public use, neither of which is disputed.

It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied.

Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill. Such as he disapproved demanded no further action.

It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. *Gordon v. United States*, 2 Wall. 561. An act of Congress removing

this objectionable feature having passed the year after that decision, the appellate power of this court has been exercised ever since. The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

The question is not a new one in this court.

In *Nichols* v. *United States* (7 Wall. 122), where a suit was brought in the Court of Claims to recover back money exacted of an importer in excess of the duties allowed by law, the court held that no contract to refund was implied, because the money, though paid under protest, was paid voluntarily, and for this reason, among others, that court had no jurisdiction.

In *Gibbons* v. *United States* (8 id. 269), an army contractor, who had agreed to furnish two hundred thousand bushels of oats at a fixed price, had, as this court held, after delivering part of the amount, been legally released from the obligation to deliver the balance. He was, however, carried before the military authority in a state of fear and trepidation, and to save himself further trouble agreed to and did deliver the remainder of the oats. He sued in the Court of Claims for the difference between the contract price and the market price of the oats at the time of the delivery. One ground of his claim was that he acted under duress and the constraint of fear, and that his agreement to deliver at the contract price was void.

This court said, in answer to this argument, that "it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts. . . . The language of the statutes which confer jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. . . . These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the general government, though they have been committed while serving the government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination."

With the reaffirmation of this doctrine, which excludes the present case from the jurisdiction of that court, its judgment dismissing the petition of plaintiff is

Affirmed.

CRESWELL v. LANAHAN.

The Freedman's Savings and Trust Company, chartered by an act of Congress approved March 3, 1865 (13 Stat. 510), being, during a financial crisis pressed for means, its agent, with the knowledge and consent of its trustees, borrowed of A. moneys which were applied to its use. A note therefor was signed by the actuary of the institution, who subsequently transferred to A., in satisfaction thereof, certain securities belonging to the company. That officer was held out to the public as competent to make such an exchange, and there was no departure in this instance from the established usage. No fraud was committed, and the transaction was advantageous to the institution. On the failure of the company, the commissioners appointed to wind up its affairs filed their bill, praying that A. be decreed to deliver to them said securities. *Held*, that the commissioners are not entitled to relief.

APPEALS from the Supreme Court of the District of Columbia.

The Freedman's Savings and Trust Company, and John A. J. Creswell and others, its commissioners, filed, June 26, 1875, two bills in equity in the court below against Thomas M. Lanahan and others. One bill charges that Juan Boyle, on or about July 31, 1871, being indebted to the company in the sum of $2,500, for which it held his note of that date, payable in one year, executed and delivered to Eaton and Stickney to secure its payment, a deed of trust of the same date (duly recorded), with the usual power of sale, conveying certain real estate in Washington.

It further charges that the note held by the company as part of its assets was, June, 1874, unlawfully, and to the prejudice of its depositors and creditors, taken from its assets, and delivered to Lanahan, who is now holding it in his possession and pretending to be the owner of it. The delivery and transfer of the note to him are then charged to have been unlawful and void, upon the ground that the act of Congress of March 3, 1865 (13 Stat. 510), organizing the company, requires the affirmative vote of at least seven members of the board of trustees to transfer any securities or assets belonging to the corporation, and the complainants charge that the note was transferred without any vote whatever, and without the knowledge and consent of any of the trustees.

The prayer of the bill is for general relief, and specially, that the pretended transfer of the note to Lanahan be declared null

and void; that he be directed to bring it into court to be disposed of according to law; and that the trust property be sold and the proceeds applied to the payment of the note, for the benefit of the company and its creditors.

The other bill makes the same averments and claims the same relief as to a note for $8,000, executed to the company by Anna E. Boyle and others, secured in the same manner as the note of Juan Boyle, and transferred to Lanahan in the same way.

Lanahan answered, stating the circumstances under which he came into possession of the notes in question, and setting up a title thereto. They and so much of the charter of the company as relates to the case will be found in the opinion of the court.

The bill in each case was, on final hearing, dismissed, and the commissioners appealed.

Mr. Enoch Totten for the appellants.

Mr. S. Teakle Wallis for the appellees.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Several of the documents referred to by the witnesses in one of the cases have been lost or destroyed, and there is some uncertainty and conflict in the testimony with respect to them and the transactions to which they relate. The discrepancies are not material, and the substantial facts appear with sufficient clearness to enable us satisfactorily to dispose of the controversy. A statement, somewhat condensed, will be sufficient for the purposes of this opinion.

In 1873, the Freedman's Savings and Trust Company, the corporation represented by the appellants, found itself seriously embarrassed for the want of means to meet its current daily liabilities. In November or December of that year, it borrowed from the appellee Lanahan the sum of $10,000, for which it gave its note, payable at sixty or ninety days, probably bearing a high rate of interest, and secured by $20,000 of the improvement bonds of the District of Columbia at their par value. The note was executed by the actuary of the company. The loan was negotiated by the appellee, Juan Boyle, who acted as the agent of the company, by virtue of a written document under the hand of its president and its corporate seal. The money was applied in payment of depositors. The institution was

suffering from the financial revulsion initiated and precipitated by the failure of Jay Cooke & Co., which swept over the entire country. It was deemed better to make loans at the interest paid, whatever it was, than to sell securities at the rates which then ruled in the markets.

About the 1st of May, 1874, it was agreed between Lanahan and Boyle that the former should lend the latter $21,000, including the note of the company for $10,000, and that Boyle should procure the company to transfer to Lanahan a note of Anna E. Boyle and others to the company for $8,000, secured by deed of trust to Eaton and Stickney, and the note of Juan Boyle to the company for $2,500, secured by another deed of trust to the same parties. Other collaterals, with which the company had nothing to do, were also to be delivered by Boyle to Lanahan. Boyle thereupon delivered the note for $10,000 to the company, and the company transferred and delivered to Lanahan the two notes of $8,000 and of $2,500. Both these notes were then overdue. This terminated Lanahan's dealings with the company, and these are the notes involved in this controversy. The bill, without imputing fraud, avers that Lanahan is not entitled to hold them, and prays that he may be decreed to deliver them to the complainants.

At the same time that Boyle delivered to the company its note for $10,000, he made a full and final settlement with it of all the liabilities of himself and of Juan Boyle & Co. He was found indebted to the company, after deducting the note of $10,000, in the sum of $28,522.38. Boyle thereupon gave the note of Juan Boyle & Co. for $28,000, secured it by certain collaterals, and paid the balance in cash. Subsequently the collaterals proved to be worthless, the firm became insolvent, and the debt is hopelessly lost to the company. It was considered safe by the actuary at the time of the transaction. Eaton, one of the trustees in the deeds of trust, died, and by proper proceedings the respondent Cull was substituted for him and Stickney. The third section of the act of Congress chartering the institution is as follows: —

"The business of the corporation shall be managed and directed by the board of trustees, who shall elect from their number a president and two vice-presidents, and may appoint such other officers

as they may see fit; nine of the trustees, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any regular or adjourned meeting of the board of trustees; and the affirmative vote of at least seven members of the board shall be requisite in making any order for, or authorizing the investment of any moneys, or the sale or transfer of any stock or securities belonging to the corporation, or the appointment of any officer receiving any salary therefrom."

On the 18th of September, 1873, the board of trustees authorized and empowered the officers of the company to assign and transfer any of the registered stock of the United States standing in its name.

On the 13th of December in that year, the same board directed the finance committee to authorize those officers to negotiate the securities of the company in such manner as to relieve the bank from its embarrassment.

There was no formal order touching either of the transactions of Lanahan with the company, but they were communicated, as were all others, daily to the individual members of the board. There is no proof that any objection was ever made. Several of the trustees expressed an earnest desire that the company should escape from the embarrassments by which it was surrounded, and be able to avoid bankruptcy. The threatened catastrophe proved inevitable. On the 29th of June, 1874, the company closed its doors, and a few days later went into liquidation. In the transactions with Lanahan in making the loan and giving the note in one case, and in transferring and handing over the two notes in the other, the actuary was governed by the settled usage of the bank in all such cases.

It is a striking fact that there is nothing in the record which casts the slightest shadow of bad faith upon either of the respondents, or upon the president or actuary of the company. It does not appear that a dollar of its means went fraudulently into the pockets of either of those parties.

The case naturally divides itself into two parts, each of which requires separate consideration: —

1. As to the loan of $10,000, and the note given to the lender.

2. The transfer of the two Boyle notes.

The question presented as to the first point is easy of solution. The money was fairly borrowed. The note was given for it, and the fund was honestly applied in payment of pressing liabilities of the company. The trustees individually were advised of the transaction and made no objection. It would be a perversion of the plainest principles of reason and justice to permit the validity of such a security to be effectually denied. It cannot be done. *De Groff* v. *American Linen Thread Co.*, 21 N. Y. 124; *Parish* v. *Wheeler*, 22 id. 494; *Bradley* v. *Ballard*, 55 Ill. 413; *Steamboat Company* v. *McCutchen & Collins*, 13 Pa. St. 13.

Courts do not look at such transactions with the microscopic eyes of a special demurrer.

The second point hardly admits of more doubt than the first one.

The company took up its note given to Lanahan, and gave him in place of it the two notes of the Boyles, amounting together to $10,500. When this was done, Juan Boyle paid the company $522.38. This was more than the difference in amount between the note first named and the other two. Certainly the company could sustain no possible injury from this exchange. It paid a debt overdue, and took up its note by parting with two of its securities. With the residue of the settlement between Boyle and the company Lanahan had nothing to do. He was neither a party nor privy. As to him it was *res inter alios acta*. It cannot in any wise affect his rights, and may properly be laid out of view.

If the two notes which he received can be wrested from him, the company will have had the full benefit of the loan, and have got back its note without paying any thing, while he will have lost the entire amount. This is a suit in equity. It would be a singular equity that could work out such a result.

But further: the actuary who made the exchange of securities was held out to the world as competent to do what he did. It was done in conformity to the established usage of the company in all such cases. Under such circumstances, the institution cannot be permitted to deny that he had all such powers as he habitually exercised, and thus assumed to have. *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

The transaction, like all others, was made known to the trustees individually, and they never objected. This intelligent acquiescence was a binding ratification. *Kelsey* v. *National Bank of Crawford County*, 69 Pa. St. 426; *Hilliard* v. *Goold*, 34 N. H. 230; *Christian University* v. *Jordan*, 29 Mo. 68; *Sherman* v. *Fitch*, 98 Mass. 59.

The arrangement was first challenged after the company became bankrupt and went into the hands of the appellants.

The company was concluded, and the appellants can be in no better position. They, like assignees in bankruptcy, can have no rights, legal or equitable, but those of the insolvent party whom they represent. *Gibson* v. *Warden*, 14 Wall. 244.

The appellants are not entitled to any relief.

Other legal views which are applicable lead to the same conclusion, but it is unnecessary to pursue the subject further.

This opinion disposes also of the second case. The two cases are the same, *mutatis mutandis*.

Decrees affirmed.

CHRISTIAN UNION *v.* YOUNT.

1. While a corporation must dwell in the State which created it, its existence may be elsewhere acknowledged and recognized. Its residence creates no insuperable objection to its power of contracting in another State.
2. In harmony with the general law of comity among the States composing the Union, the presumption is to be indulged that a corporation, if not forbidden by its charter, may exercise the powers thereby granted within other States, including the power of acquiring lands, unless prohibited therefrom, either in their direct enactments or by their public policy, to be deduced from the general course of legislation or the settled adjudications of their highest courts.
3. This court cannot presume that it is now, or was in 1870, against the public policy of Illinois that one of her citizens owning real estate there situate should convey it to a benevolent or missionary corporation of another State of the Union, for the purpose of enabling it to carry out the objects of its creation, since she permitted her own corporations, organized for like purposes, to take such real estate by purchase, gift, devise, or in any other manner.

4. Where land in Illinois was conveyed to a New York corporation, the children and heirs-at-law of the grantor, who file their bill to set aside the conveyance upon the ground that it was against the public policy of Illinois, cannot raise the question that the grantee acquired a larger quantity of lands than its charter allowed.
5. *Carroll* v. *The City of East St. Louis* (67 Ill. 568) and *Starkweather* v. *American Bible Society* (72 id. 50) distinguished.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Mr. W. J. Henry for the appellant.
Mr. E. S. Terry, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by Yount and others against the American and Foreign Christian Union to set aside a conveyance of certain lots or parcels of land in the State of Illinois, alleged to be of the value of $10,000, which was executed, May 19, 1870, by Stephen Griffith, a citizen of that State, to the Christian Union, a corporation created in the year 1861 under the laws of New York, providing for the incorporation of benevolent, charitable, scientific, and missionary societies in the latter State.

A decree was rendered against the corporation, and it appealed here.

The place of business and principal office of the appellant was and is in the city of New York, but there seems to be no inhibition, in its charter, upon the exercise of its functions in other States. The declared object of its incorporation was, "by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists."

The appellees, who are the children and heirs-at-law of Griffin, pray for a decree declaring the conveyance to be null and void, and requiring the appellant to convey to them the premises in dispute. They broadly claim that by the settled law of Illinois a foreign corporation cannot take or hold lands in that State, and that, consequently, no title passed to the

appellant from their ancestor. That is the fundamental proposition in the case, and is the only one which counsel for the appellees, in support of the decree below, has deemed it necessary to discuss with any fulness.

By the statute of New York under which the appellant was organized, it was made capable of taking, receiving, purchasing, and holding real estate for the purposes of its incorporation, and for no other purpose, to an amount not exceeding the sum of $50,000 in value, and personal estate for like purposes to an amount not exceeding $75,000 in value, the clear annual income of such real and personal estate not, however, to exceed the sum of $10,000. No question is made here as to its right, consistently with its own charter and the laws of New York, to acquire, for the purposes of its creation, real estate within, at least, the quantity designated by its charter.

The appellant, then, having this capacity by its charter, and not being expressly prohibited from exercising its powers beyond the State which created it, we proceed to inquire whether it was forbidden by the laws of Illinois in force in the year 1870 from taking title by conveyance to real property within the limits of that State, for the objects designated in its charter. For, besides the admitted incapacity of a corporation of one State to exercise its powers in another State, except with the assent or permission, expressed or implied, of the latter, it is a principle "as inviolable as it is fundamental and conservative, that the right to hold land, and the mode of acquiring title to land, must depend altogether on the local law of the territorial sovereign." *Runyan* v. *The Lessee of Coster*, 14 Pet. 122; *Lathrop* v. *Commercial Bank of Scioto*, 8 Dana (Ky.), 114.

By a general law of Illinois, enacted in 1859, any three or more persons of full age, citizens of the United States, a majority of whom were also required to be citizens of that State, could become a body politic and corporate for benevolent, charitable, educational, literary, musical, scientific, religious, or missionary purposes, and in their corporate capacity take, receive, purchase, and hold real and personal estate, and, for charitable purposes only, sell and convey the same. Laws of Ill., 159, p. 20; Gross's Rev. 124.

Corporations formed under that law were made capable of taking, holding, or receiving any property, real estate or personal, by *gift*, *purchase*, *devise*, or *bequest*, or in any other manner. Authority was given to sell real estate purchased by them for their own use, with any building erected thereon, and invest the proceeds in the purchase of another lot, or the erection of another building, or both. As to such as was devised or given to them for any specified benevolent purpose, authority was conferred to sell the same and apply the proceeds in aid of that purpose, such real estate, however, not to be held more than five years.

This general statute was in force when the conveyance to the appellant was executed. It thus appears that when its rights accrued under that conveyance the statutes of Illinois expressly provided for the incorporation of societies having objects similar to those of the appellant, and with capacity to take, receive, and hold real property, by gift, purchase, devise, bequest, or in any other manner, for the purposes of their creation. Shortly after the passage of the general law of 1859, to wit, at its session of 1861, the General Assembly created a large number of religious and charitable corporations, with like capacity to take, receive, and hold real and personal property; and in the year 1863 it expressly exempted from taxation real and personal property which the American Bible Society, a corporation of New York, then owned or might thereafter acquire in the State of Illinois, not exceeding $50,000 in value; also all Bibles and Testaments in its depositories, and any articles of personal property necessary for the prosecution of its objects. Pri. Laws Ill., 1863, p. 26.

The conclusion is not to be avoided that the State, prior to 1870, authorized, if it did not steadily encourage, the organization of societies for benevolent, charitable, religious, and missionary objects, and endowed them with capacity to acquire by purchase, gift, or devise, real estate for the purposes of their creation. It had not then, nor, so far as we are informed, has it since, passed any statute expressly forbidding corporations of other States, having like objects, from taking, receiving, purchasing, or holding real property in that State to the same extent and for the same purposes as were allowed to its own corpo-

rations of that class. Nor is our attention called to any statute in force in 1870, or subsequently, which expressly forbade foreign corporations from exercising, within the State of Illinois, the functions with which they were endowed by the respective States creating them, or which made the express permission by statute of that State a condition precedent to the recognition within its jurisdiction of the corporations of other States. Although, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. "Its residence in one State creates no insuperable objection to its power of contracting in another." *Runyan* v. *The Lessee of Coster*, 14 Pet. 122. In *Cowell* v. *Springs Company* (100 U. S. 55) we said: "If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden." In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court. There was here no such direct legislation during or prior to the year 1870, nor can the existence of such a public policy be inferred from the general course of legislation or judicial decisions in Illinois up to and including that year, in relation to religious, benevolent, charitable, or missionary societies created in other States.

But it is contended that the precise question now under consideration has been heretofore decided by the Supreme Court of Illinois adversely to these views in *Carroll* v. *The City of East St. Louis* (67 Ill. 568) and *Starkweather* v. *American Bible Society* (72 id. 50), and that this court is obliged to follow the construction of the State law and give effect to the public policy of Illinois, as announced by the highest court of that State. Our obligation to follow, without question, these decisions arises, it is claimed, out of the express provisions of the act of Congress declaring that the laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This provision was incorporated in the original judiciary act, and has been retained in the statutes of the United States to the present time. Under it we have often declared that the construction given to a State statute by the highest judicial tribunal of such State is to be accepted in the Federal courts as a part of the statute whenever they are required to determine questions, or ascertain rights arising out of or dependent upon such local statute. But how far the Federal courts, in the ascertainment and enforcement of property rights, dependent upon the statute law, or the settled public policy of a State, are bound by the decisions of the State court, rendered after such rights were acquired or became vested, is a different question, and one of the gravest importance. The rule upon this subject has been announced, with some qualifications arising out of the circumstances of the particular cases, heretofore decided in this court. Its extended discussion is not, however, essential in this case, since the decisions of the Supreme Court of Illinois, upon which counsel for appellees rely, do not, in our judgment, necessarily conclude the precise point here involved.

In *Carroll* v. *The City of East St. Louis* (*supra*), the question before the court was whether the Connecticut Land Company, a corporation created in another State for the sole purpose of buying and selling lands, had power to purchase and hold title to lands in the State of Illinois. The decision was that it could not, for the reason — and no other is assigned — that the com-

pany, if permitted to exercise its functions in Illinois to the full extent authorized by its charter, could acquire lands without limit as to quantity, and hold them in perpetuity; that such privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities, as indicated not by express enactment, but with absolute certainty, by the general course of its legislation from the very organization of the State.

Two of the judges dissented from the opinion, so far as it held invalid a transfer of land by the corporation to a purchaser.

The subsequent case of *Starkweather* v. *American Bible Society* (*supra*) involved the title to certain real estate, an undivided interest in which was devised by one Starkweather to the trustees of the American Bible Society, established in 1816, to have and to hold the same for its use, but not to be entitled to the same, or its income, until his youngest child became of age. The claim of the Bible Society was denied, by the court, upon the following grounds: 1. That by the laws of New York, as declared by the highest court of that State, it had not the capacity to take title to real property in New York by *devise*. 2. That New York had no power to create a body incapable of taking land in that State *by devise*, and yet with power to so take lands in a foreign jurisdiction. 3. And by way of argument, that if New York was to so enact, and other States were to so consent, then such bodies might so receive and hold lands; but, said the court, the former had not so enacted, nor had Illinois so consented, since, when the will of Starkweather was probated, Sept. 16, 1867, there was no statute of Illinois which authorized foreign corporations to hold lands *by devise* in that State. 4. The principles announced in *Carroll* v. *The City of East St. Louis* were regarded as conclusive against the claim of the Bible Society, "as," said the court, "all of the inconveniences and injuries are as likely to ensue in this, and other cases like it, as in that." 5. The devise being illegal and void, the court could not decree a sale of the real estate devised and direct the payment of the proceeds to the society.

We are of opinion that the Starkweather case does not deter-

mine the particular question we have been considering. It does not decide that the devise to the Bible Society was void solely because of the absence of some statute expressly and affirmatively authorizing or permitting devises of real estate in Illinois to corporations of other States. The absence of such a statute was referred to, as we suppose, for the purpose of showing that the admitted incapacity of the Bible Society, under the law of its own creation, to take real estate by devise, and its consequent inability to acquire in that mode real estate situated elsewhere, could not be removed or be met by any thing in the legislation of Illinois, since no statute in force when the will was probated conferred upon foreign corporations the right to acquire real property in that State by devise.

The Starkweather case was held to be concluded by the principles announced in the Carroll case, for the reason, perhaps, that the property devised could, consistently with the will of the testator and the charter of the society, have been held for a period of time beyond that allowed to similar corporations of Illinois holding lands in that State. Upon no other ground are we able to understand how the Starkweather case was concluded by the principles announced in *Carroll* v. *East St. Louis*. Neither decision warrants the conclusion that, at the date of the deed to appellant, a benevolent, religious, or missionary corporation of another State having authority under its own charter to take lands, in limited quantities, for the purposes of its incorporation, was forbidden by the statutes or the public policy of Illinois, from taking title, *for such purposes*, to real property in that State, under a conveyance from one of its citizens, duly executed and recorded as required by its laws. The conveyance to the appellant can be sustained without in any degree impairing or doing violence to the fundamental principle enunciated in the Carroll case; viz., that corporations cannot acquire lands in Illinois in large quantities, to be held, or which may be held, in perpetuity. It can also be sustained, without violating the main proposition laid down in the Starkweather case; viz., that a foreign corporation, forbidden by the laws of the State creating it, to acquire lands there, by devise, could not, by that mode, take lands in Illinois, in the absence of a statute of that State assenting thereto. We cannot presume that it is

now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a benevolent or missionary corporation of another State of the Union, for the purpose of enabling it to carry out the objects of its creation, when that State permitted its own corporations, organized for like purposes, to take real estate within its limits, by purchase, gift, devise, or in any other manner.

We have considered these questions with reference to the law of Illinois at the date of Griffith's conveyance. But our conclusions are strengthened by her subsequent legislation. We refer particularly to the general statute passed in 1872, providing for the organization of corporations for pecuniary profit, or for any lawful purpose except banking, insurance, real-estate brokerage, the operation of railroads (other than horse and dummy railroads), and the business of loaning money, with authority to own, possess, and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and to sell and dispose of the same when not required for the uses of the corporation. All real estate acquired in satisfaction of any liability or indebtedness, and not necessary and suitable for the business of the corporation, was required to be annually offered at public auction, and if not sold within five years, its sale could be enforced by information in the name of the State against the corporation. Sect. 26 of that general statute expressly recognizes the right of foreign corporations to acquire real estate in Illinois. Its language is: "Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this act." Hurd's Ill. Rev. 1879, p. 290.

Distinct provision was made in the same statute for the organization of societies, corporations, and associations, not for pecuniary profit, with capacity to take, purchase, hold, and dispose of real and personal estate for purposes of their organiza-

tion. The statute imposes on the corporations last described no restrictions as to the quantity of estate they may take and hold, except that it must be for the purposes of their organization. Churches, congregations, or societies formed for religious worship, when incorporated under that statute, in addition to grounds for burying and camp-meeting purposes, were limited to ten acres of ground for houses, buildings, or other improvements for the convenience and comfort of such congregations, church, or society.

If the settled public policy of Illinois in 1870 forbade a benevolent missionary corporation of another State from taking title to real estate in Illinois for purposes of its organization, a general statute would hardly have been passed in 1872 recognizing the right of foreign corporations organized for pecuniary profit to hold real estate in Illinois, to the same extent and under like powers with domestic corporations of the same class.

Appellees, in their pleadings, allege that the lots conveyed by their ancestor to the American and Foreign Christian Union were not required or necessary for the convenience or transaction of its business. These allegations are both insufficient and immaterial: insufficient, because they may be true, and yet the appellant, with the lots in dispute added to its property, may not have had more real estate than its charter permitted; immaterial, because if, as we hold, the appellant could consistently with its own charter and the law of Illinois take title to real property in that State for the purposes of its creation, its acquisition of a larger quantity of real estate than its charter allowed, or its business required, or was consistent with the law of Illinois, was not a question which the appellees have any right to raise. If the title passed by valid conveyance from their ancestor, it is of no concern to them that the appellant has acquired or is holding more real estate than its charter authorizes.

We forbear the discussion of any other question arising upon the assignments of error. It is apparent from the record and the argument of counsel that the decree of the court below was based upon the conclusion that the appellant, being a foreign corporation, was forbidden by the law of Illinois from

taking title to the property in controversy. No proof was taken, nor was the case heard upon the issue as to the mental capacity of Griffith to execute the conveyance of 1870, or as to its having been obtained by fraudulent solicitations and representations upon the part of the agents of the appellant. The parties should have an opportunity to prepare the cause, and have it heard upon those issues.

The decree will be reversed, with directions to overrule the demurrer to the cross-bill and the exceptions to the answer, and for such further proceedings as may be consistent with this opinion.

So ordered.

KAIN v. GIBBONEY.

1. In Virginia, since her repeal of the statute of 43d Elizabeth, c. 4, charitable bequests stand upon the same footing as other bequests, and her courts of chancery have no jurisdiction to uphold a charity where the objects are indefinite and uncertain. Such being the settled doctrine of her court of last resort this court accepts and enforces it in passing upon an attempted testamentary disposition of property which is claimed under the law of the State to be a valid gift for charitable uses.
2. A., who resided and died in Virginia, by her last will and testament, bearing date Dec. 9, 1854, and admitted to probate in 1861, bequeathed her property and money to B., "Roman Catholic bishop of Wheeling, Virginia, or his successor in said dignity, who is hereby constituted a trustee for the benefit of the community" (an unincorporated association previously described as a religious community attached to the Roman Catholic Church), the same "to be expended by the said trustee for the use and benefit of said community." *Held*, 1. That the bequest, conceding it to be for charitable uses, is invalid. 2. That the legislation of Virginia touching devises or bequests for the establishment or endowment of unincorporated schools or validating *conveyances* for the use and benefit of any religious society does not apply to this bequest.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

On Aug. 7, 1853, Malvina Matthews, of Wythe County, Virginia, made her last will and testament, which was duly admitted to probate, devising a tract of land on which she then lived, to Granville H. Matthews in trust for her two daughters, Malvina and Eliza, and authorizing him to sell it and invest

the proceeds at his discretion; one half of the annual interest or dividends accruing therefrom to go to each of them as a fund, for her separate and sole use and benefit, especially in the event of her marriage. The will declared that one moiety of the principal arising from the sale of the land might be disposed of by each, either by deed to take effect after her death, or by will, and not otherwise.

Matthews sold the land, but was removed from the executorship and trusteeship; and Robert Gibboney, who was appointed in his stead, received of the trust fund $7,985.88, of which one-half belonged to said Eliza. The latter died, and her will, bearing date Dec. 9, 1854, was, in 1861, admitted to probate in the county court of Wythe County. Robert Gibboney qualified as her administrator. The will, after making various pecuniary bequests, among them one of $500 to "Richard V. Wheelan, Roman Catholic Bishop of Wheeling, Virginia, and his successors in that church dignity," contained the following provision: —

"In the event that I may hereafter become a member of any of the religious communities attached to the Roman Catholic Church, and am such at the time of my death, then it is my will that all the foregoing bequests and legacies be void, and that my executors hereinafter named shall pay over the whole of the property or other thing, after disposing of the same for money, to the aforesaid Richard V. Wheelan, bishop as aforesaid, or his successor in said dignity, who is hereby constituted a trustee for the benefit of the community of which I may be a member, the said property or money to be expended by the said trustee for the use and benefit of said community."

After making her will, she became a member of an unincorporated religious community attached to the Roman Catholic Church, known as the "Sisters of Saint Joseph," and was such at the time of her death.

In 1871, Alexander S. Matthews, her brother, instituted a suit against her legatees and other heirs-at-law in the Circuit Court of said county, to contest the validity of her will. An issue of *devisavit vel non* was ordered but not tried, as by consent of the counsel of the parties it was decreed that he should be paid from her estate the part thereof to which he would have been

entitled had she died intestate; and that the devisee named in the will should proceed to collect the estate, and, after paying the debts and costs of suit, pay to said Alexander the tenth part. The suit was thereupon dismissed, with leave to have the same reinstated if necessary, for the purpose of enforcing the decree.

Some time thereafter, Elizabeth G. Gibboney, the executrix of Robert Gibboney, who had departed this life, delivered to Wheelan, as part of the estate of Eliza, a bond of one Johnson for $500.

Thereupon Wheelan brought this suit, in the court below, against said Elizabeth, to recover the residue of that estate, and alleged that said Robert had never invested the fund which he received as the trustee of Eliza, but had converted it to his own use, except the bond of Johnson.

Wheelan died, and John J. Kain having been duly appointed Bishop of Wheeling, the suit was revived in his name.

The bill was, on demurrer, dismissed, and Kain appealed to this court.

Mr. John W. Johnston for the appellant.
Mr. John A. Campbell, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The bequest which the complainant seeks to enforce by this bill was an attempted testamentary disposition under the law of Virginia, and the matter now to be determined is whether by that law it can be sustained. It may be conceded that, notwithstanding its uncertainty, a legacy given in the words of this will, if for a charity, would be held valid in England, and in most of the States of the Union. But we have now to inquire, What is the law of Virginia? The gift was made to "Richard V. Wheelan, Bishop of Wheeling, or to his successor in said dignity." It was, therefore, in effect, a gift to the office of the Bishop of Wheeling. Neither Bishop Wheelan, nor any bishop succeeding him, was intended to derive any private advantage from it. Nothing was intended to vest in him but the trust, and that was required to be executed by whomsoever should fill the office of bishop, only so long as he should fill it,

and executed in his character of bishop, not as an individual. The bequest was practically to a bishopric, and as a bishop is not a corporation sole, it may be doubted whether, at the decease of the testatrix, there was any person capable of taking it. True it is, that generally a trust will not be allowed to fail for want of a trustee: courts of equity will supply one. But if it could be conceded that Wheelan was, in his lifetime, capable of taking the bequest, and that Bishop Kain is capable of taking and holding after the death of his predecessor, a greater difficulty is found in the uncertainty of the beneficiaries for whose use the trust was created. In the words of the will, they are a religious community, of which the testatrix contemplated she might die a member. She died a member of a religious community attached to the Roman Catholic Church, known as the "Sisters of St. Joseph." That is an unincorporated association, and it is the association as such, and not the individual members who composed it, when the testatrix died, which is declared to be the beneficiary. Nor is it the community attached to any local church which is designated, but a community attached to the Roman Catholic Church, wherever that church may exist. Its members must be constantly changing, and it must always be uncertain who may be its members at any given time. No member can ever claim any individual benefit from the bequest, or assert that she is a *cestui que trust;* and the community having no legal existence, can never have a standing in court to call the trustees to account. This bequest is, therefore, plainly invalid, unless it can be supported as a charity. And it is far from evident that it is a gift for charitable uses. It looks more like private bounty. Charity is generally defined as a gift for a public use. Such is its legal meaning. Here the beneficial interest is given to a religious community, but not declared to be for religious uses. There is nothing in the will to show that aid to the poor, or aid to learning, or aid to religion, or to any humane object was intended.

Conceding, however, that it is a charitable bequest, it is a Virginia gift, by a Virginia will, and in that State charities in general are not upheld to any greater extent than ordinary trusts are. This will be very manifest when the decisions of

the courts of the State and of this court are reviewed. The subject was fully considered in *Baptist Association* v. *Hart's Executors* (4 Wheat. 1), decided in 1819. There it appeared that the testator, a citizen of Virginia, had bequeathed certain military certificates to "the Baptist Association that for ordinary meets at Philadelphia annually," to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of his father's family. Before the death of the testator the legislature of the State had repealed all English statutes, including, of course, the 43d Elizabeth, c. 4, at that time generally regarded as the origin of the jurisdiction of equity over charities. This court held that the Baptist Association, not having been incorporated at the testator's decease, could not take the trust as a society. 2. That the individuals composing it could not take. 3. That there were no persons who could take, if it were not a charity. 4. That the bequest could not be sustained as a charity. 5. That charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot, independently of the 43d Elizabeth, c. 4, be sustained by a court of equity, either in exercising its ordinary jurisdiction, or in enforcing the prerogative of the king as *parens patriæ*.

It is true, that the fifth rule thus announced, as a general proposition, is now known to have been erroneously stated. Trusts for charitable uses are not dependent for their support upon that statute. Before its enactment, they had been sustained by the English chancellors in virtue of their general equity powers in numerous cases. *Vidal* v. *Girard's Executors*, 2 How. 127. And generally, in this country, it has been settled that courts of equity have an original and inherent jurisdiction over charities, though the English statute is not in force, and independently of it. It is believed that such is the accepted doctrine in all the States of the Union, except Virginia, Maryland, and North Carolina. But, as we have said, the rule in Virginia is different, and it has been different ever since the case of *Vidal* v. *Girard's Executors* was decided.

In 1832, the case of *Gallego's Executors* v. *The Attorney-General* (8 Leigh (Va.), 450) came before the Court of Appeals of that State. A testator had directed his executors to lay by $2,000, "to be distributed among needy poor and respectable widows;" and in case the Roman Catholic chapel should be continued at the time of his death, he directed the executors to pay $1,000 towards its support, and if the Roman Catholic congregation should come to a determination to build a chapel at Richmond, to pay $3,000 towards its accomplishment. He further devised a lot to four trustees, in trust, to permit all and every person belonging to the Roman Catholic Church as members thereof, or professing that religion and residing in Richmond, to build a church on the lot for the use of themselves, and of all others of their religion who might thereafter reside in Richmond. These were undoubtedly gifts to charitable uses. Upon an information and bill in chancery to enforce the bequest and devise as charities, it was held that they were all uncertain as to the beneficiaries, and therefore void. The court ruled that the English statute of charitable uses having been repealed in Virginia, the courts of chancery of that State had no power to enforce charities where the objects are indefinite and uncertain, and that charitable bequests stand on the same footing as other bequests. The opinion of President Tucker is very elaborate, and fully sustains that view, approving the doctrine announced in *Baptist Association* v. *Hart's Executors*, *supra*.

This case was followed by *Wheeler* v. *Smith et al.* (9 How. 55), decided in 1850, after Vidal's case. It reasserted the doctrine of *Gallego's Executors* v. *The Attorney-General* (*supra*), as the law of Virginia, and declared that the courts of chancery had no jurisdiction to uphold charities when the objects are indefinite and uncertain. Therefore, a bequest for a public purpose, namely, one given to trustees "for such purposes as they might consider to be most beneficial to the town and trade of Alexandria," was declared void.

In *Seaburn's Executors* v. *Seaburn* (15 Gratt. (Va.) 423), the case of *Gallego's Executors* v. *The Attorney-General* was again recognized as the law of the State, except so far as it had been modified by the statutes, and it was ruled that they did not

authorize a devise of land for the use of a religious congregation, but a conveyance only. *A fortiori*, that it did not authorize a bequest of money, to be expended in building a church at a specified place, or for the support of the pastor of such church.

So in a case not reported, a devise in these words: "I give to the Rev. W. J. Plummer, D.D., the residue of my estate, real and personal, in trust for the board of publication of the Presbyterian Church of the United States," was held to be void.

We do not overlook the fact that there are cases in which trusts for charitable uses have been sustained, though the description of the beneficiaries was uncertain, but in them all the decisions have been rested upon statutes of the State enacted to provide for special cases. In 1841–42, an act was passed by which it was declared that every *conveyance* should be valid which should thereafter be made of land for the use or benefit of any religious congregation, as a place for public worship, or as a burial place, or a residence for a minister. This was amended in 1866–67 by adding "or for the use or benefit of any religious society, or a residence for a bishop, or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or society, and employed under its authority and about its business." Civil Code of 1860, c. 78, tit. 22, sect. 8; Civil Code of 1878, c. 76, tit. 22, sect. 8. It will be observed these statutes validate only conveyances. They controlled the decision made in *Brooke et al.* v. *Shacklett* (13 Gratt. (Va.) 301), decided in 1856, and *Seaburn's Executors* v. *Seaburn* (*supra*), decided in 1859. The first of these cases — a deed conveying property in trust for the erection of a local Methodist church and the use of its members — was sustained. But Gallego's case was expressly recognized as the law of the State, except so far as the statute had changed it.

On the 2d of April, 1839, the legislature passed an act declaring that devises and bequests for the establishment or endowment of unincorporated schools, academies, or colleges, should be valid, requiring, however, that reports of the devises or bequests should be made to the legislature, and that in case

it should fail to incorporate the schools, academies, &c., within a certain time, the gifts should fail. Acts of 1839, c. 12, 11, 13.

So, also, at an early date, the State created a corporation to manage what was called the literary fund (Civil Code of 1860, chapters 78, 79, 80), and by the sections of chapter 80 it was enacted that every gift, grant, devise, or bequest made since April 2, 1839, or which might be made thereafter, for literary purposes, or for the education of white persons within the State (other than for the use of a theological seminary), whether made to a body corporate or unincorporated, or to a natural person, should be as valid as if made to or for the benefit of a certain natural person, with some exceptions. Under these and similar statutes charitable gifts in favor of the literary fund, or of schools, have been sustained, which, without the statutes, would have been held invalid. Such were *Literary Fund* v. *Dawson*, 10 Leigh (Va.), 147, and 1 Rob. (Va.) 402; *Kinnaird* v. *Miller, ex'r & als.* 25 Gratt. (Va.) 107, and *Kelly* v. *Love*, 20 id. 124. But in all these cases the general law of the State is recognized to be as asserted in *Gallego's Executors* v. *The Attorney-General*. The bequest now under consideration, therefore, cannot be sustained as a charity.

Equally certain is it that the complainant cannot stand upon the consent decree made by the Circuit Court of Wythe County upon the issue of *devisavit vel non*, ordered to try whether the instrument purporting to be the will of the testatrix was her will. That issue, framed to try only the validity of the instrument, not the validity of the disposition made by it, was never tried. It was dismissed. No decree was made that the will was valid. To the agreement recited in the decree the defendant was not a party, and the arrangement made by the counsel of the parties to the record did not bind her. Moreover, if she had been bound by it, it conferred no right upon the present complainant.

Decree affirmed.

PHELPS v. HARRIS.

1. A., although out of possession of certain lands in Mississippi, filed his bill under a statute of that State to remove a cloud upon his title to them. The question of title was directly raised and litigated by the parties. The court being of opinion that he was not entitled to any relief in the premises, dismissed the bill. A. thereupon brought ejectment against B., the defendant in the former suit. *Held*, that the decree did not render the main controversy *res judicata*, as the court merely decided in effect that the bill would not lie.
2. A power to "sell and exchange" lands includes the power to make partition of them.
3. Where a testator devising land in Mississippi appointed a trustee with power "to dispose of all or any portion of it" that might fall to the devisees and "invest the proceeds in such manner as he might think proper for their benefit," this court, without laying down as a general rule that the words "dispose of" import a power to make partition, holds, in view of the opinion of the Supreme Court of Mississippi on the precise point in a case between the same parties, although not announced under such conditions as made it *res judicata*, that the trustee had power to make partition.
4. It is not a valid objection to the partition that the trustee authorized to make it did not give his personal attention to it, but by agreement with one of the heirs demanding it, submitted it to disinterested persons, whose arbitrament he confirmed by executing the necessary indenture.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The facts are fully stated in the opinion of the court.

Mr. G. Gordon Adam, for the plaintiffs in error.
Mr. William L. Nugent, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action of ejectment for certain lands in Sharkie County, Mississippi, brought by Alonzo J. Phelps and Mary B. Phelps, his wife, the plaintiffs in error, against the defendants in error, of whom George C. Harris and Helen S. Harris, his wife, were admitted to defend as landlords, the other defendants being their tenants in possession of the property in dispute. The principal question in the case is, whether Henry W. Vick, father of the plaintiff, Mary B. Phelps, and trustee under a deed made by his wife, Sarah, in 1850, and also trustee under the will of his brother, Grey Jenkins Vick, made in 1849, had authority under those instruments to make partition

of the lands given and devised therein to, and for the use of, his children. If he had such authority, and exercised it in a proper manner, the plaintiffs have no title, and the judgment must be affirmed. If he had not such authority, or did not exercise it effectually, the plaintiffs are entitled to recover either all the land in controversy or an undivided part thereof, and the judgment must be reversed. The facts of the case are set out in a special finding of the court below.

By the deed of Sarah Vick, referred to (in which her husband joined), she conveyed certain lands of which she was seised, to a trustee, to be held upon trust for her own separate use for life, with remainder to her children in fee; subject to certain powers of sale and exchange, and with the following proviso: —

"*Provided further*, that said trustee is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick, during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control said property for the benefit of all concerned. Said Henry W. Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and to apply the proceeds to the payment of the debt due to the trustees of the Bank of the United States; if such debt is paid, the proceeds of the sale to be reinvested, and be subject to the trusts of this deed."

The deed closes with this paragraph: —

"My intention is that said Henry W. Vick shall be regarded, for the purposes of this deed, not merely as an agent, but also a co-trustee, and I desire he may be required to give no security for the performance of his duties; and the said Jonathan Pearce [the trustee] is not, in any manner, to be responsible for the acts and conduct of said Henry W. Vick."

Sarah Vick died in 1850, leaving four children by her said husband; viz., Mary B. Vick (now said Mary B. Phelps), Henry G. Vick (under whom the defendants claim), Ann P. Vick, and George R. C. Vick, all of whom were then under age and unmarried.

By the will of Grey Jenkins Vick, referred to, the said Grey devised certain lands and other property to the grandchildren

of his father and mother, among whom were the said children of Henry W. and Sarah Vick, and constituted the said Henry W. Vick trustee for his said children, giving him full power to dispose of all or any portion of said property which might fall to said children, and invest the proceeds in such manner as he might think proper for their benefit. After the said Grey's death, the said Henry W., as trustee of his said children, became seised in severalty by partition with the other devisees, of the proportion of lands devised to his said children, upon the trusts of the will.

In December, 1856, Henry G. Vick, the eldest of said four children of Henry W. and Sarah Vick, became of age, and soon after demanded from his father an account of his trust, and that his portion of the property held under said deed and will should be set off to him in severalty, and threatened to file a bill in equity for that purpose. They finally agreed to leave the matter to their attorneys, who decided that Henry G. Vick, having become of age, had the right to demand a division of the property, and to have his share set off to him; and the said attorneys signed a written instrument proposing the mode in which such division should be made, to wit, through the intervention of disinterested persons to be chosen by the parties. This plan was adopted; and Henry W. Vick and his son entered into a written agreement to that effect, designating the persons for making the partition, and binding themselves to stand to and abide by their decision. The arbitrators made an award by which the lands in controversy in this suit were allotted to said Henry G. Vick; an indenture was made between him and his father to carry the partition into effect; and he remained in possession of the lands set off to him until his death in May, 1859. It is this partition which is called in question by the plaintiffs.

Henry G. Vick died without issue, having first made a will by which he devised the lands in controversy, which were set off to him as aforesaid, to Helen S. Johnston, now said Helen S. Harris, who, after his death, went into possession thereof, and has ever since continued in possession.

The contention of the plaintiffs is, that Henry W. Vick had no authority, either under his wife's deed, or under the will of

Grey Jenkins Vick, to make partition of the lands, that the partition made with Henry G. Vick was void, that he acquired no separate estate thereby, and had no power to devise the lands specifically, and that the plaintiff, Mary B. Phelps, as sole surviving child of Henry W. and Sarah Vick (the others having died without issue), is entitled to recover the property.

In pursuit of the supposed rights of Mary B. Phelps, the plaintiffs, in February, 1871, exhibited a bill in the Chancery Court of Washington County, Mississippi (in which the lands in controversy were then situated), against the defendants, George C. Harris and Helen his wife, to remove the cloud from the supposed title of said Mary, raised by said partition and the will of Henry G. Vick. The defendants relied on the validity of said partition and will, and the question was fully contested. In November, 1878, a decree was made dismissing the bill. An appeal was taken, and the Supreme Court affirmed the decree. The plaintiffs then brought this action of ejectment; and one of the questions in the cause is, whether the decree in the chancery suit did not render the controversy *res judicata*. The plaintiffs contended that it did not, and that the only effect of the decree was, to decide that a bill to remove the cloud from the title would not lie, leaving the parties to all their legal rights in an action at law.

On this question the court below finds and concludes as follows: —

"And the court here now finds as a fact, from an inspection of the record in the said chancery cause, that the question as to the validity of the partition of the lands aforesaid, made by the said Henry W. Vick and the said Henry G. Vick under the deed of the said Sarah Vick and the will of said Grey J. Vick, and the power of said Henry W. Vick to make such partition, as well as the validity of the devise made by the said Henry W. Vick to the said Helen S. Harris, was directly raised by the bill in said cause and litigated between the parties; and that the said Supreme Court adjudged and decided that the said partition and devise were both valid and effectual, and that the said Henry W. Vick had full power and authority to make the said partition with the said Henry G. Vick. Which decision so made by said court was done to determine the juris-

diction of the court in said cause, and that said Supreme Court decided that the said Chancery Court had no jurisdiction thereof, and that if the said complainants therein have any right to the lands described therein, and which are the same for which this action of ejectment is brought, it is a legal title which must be enforced in an action at law."

The decree of the Chancery Court of Washington County, which was affirmed by the Supreme Court, was in the following words: "The court being of opinion that the complainants are not entitled to the relief prayed for in their bill, or to any relief in the premises from this court, it is therefore ordered, adjudged, and decreed that the said complainants' bill of complaint be and the same is dismissed, and that complainants pay the costs, &c."

The bill was filed under a statute of Mississippi, which declared as follows: "When any person, not the rightful owner of any real estate in this State shall have any deed or other evidence of title thereto, or which may cause doubt or suspicion in the title of the real owner, such real owner may file a bill in the Chancery Court of the county in which the real estate is situated, to have such deed or other evidence of title cancelled, and such cloud, doubt, or suspicion removed from said title, whether such real owner be in possession, or be threatened to be disturbed in his possession or not, &c." Rev. Stat. Miss., 1871, sect. 975, p. 191.

It is probable that the only effect of this statute was to enable owners of land not in possession to file a bill for the removal of clouds upon their title; since the ordinary jurisdiction of a court of chancery is sufficient to enable owners in possession to file such a bill. The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embar-

rass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. "Those only," said Mr. Justice Grier, "who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." *Orton* v. *Smith*, 18 How. 263; and see *Ward* v. *Chamberlain*, 2 Black, 480, 444; *West* v. *Schnebly*, 54 Ill. 523; *Huntington* v. *Allen*, 44 Miss. 654; *Stark* v. *Starrs*, 6 Wall. 402. And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. *Overing* v. *Foote*, 43 N. Y. 290; *Meloy* v. *Dougherty*, 16 Wis. 269. Justice Story says: "Where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be cancelled or delivered up, would not seem to apply; for in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury." 2 Eq. Jur. sect. 700, a.

The Supreme Court of Mississippi, in their opinion in *Phelps* v. *Harris* (51 Miss. 789) a case between the present parties, say: "This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law, the trial of ejectments. He who comes into a court of equity to get rid of a legal title, which is allowed to cast a shadow on his own title, must show clearly the validity of his own title, and the invalidity of his opponent's. *Banks* v. *Evans*, 10 S. & M. 35; *Huntington* v. *Allen*, 44 Miss. 662. Nor will equity set aside the legal title on a doubtful state of case. The complainant, to enable him to maintain such a suit, must be the real owner of the land, either in law or equity. Had the

defendant, Mrs. Harris, derived her title to the property in controversy even from a doubtful exercise of power, that of itself would be sufficient to preclude the complainants from a resort to equity, upon the well-settled principles above laid down. The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure, and transferred to a court of equity under the pretence of removing clouds from title" (p. 793). The court further concludes that this limited jurisdiction does not draw to it the right to take jurisdiction of the whole controversy in relation to the title to the land, right of possession, rents, &c., and thus usurp the jurisdiction belonging to the courts of law.

It is true that the court, in the former part of its opinion, discussed the question of the validity of the partition made by H. W. Vick and his son, and held that the partition was good, and that the title of Henry G. Vick to the lands in controversy was perfect; and, as a consequence, that the defendant's title was also perfect. But this discussion was entered into for the purpose of showing that the title of the defendant was not so devoid of validity as to constitute a mere cloud on the title; and consequently that the case was not one in which a court of equity could give relief.

We think, therefore, that the court below was right in determining that the decree in the equity case did not render the main controversy *res judicata*, but only decided that the bill would not lie; in other words, that it was not a proper case for a court of equity to determine the rights of the parties.

This brings us to the merits of the controversy, involving the question whether the partition made between Henry W. Vick and his son Henry G. Vick was valid. The plaintiffs contend that neither the deed of Sarah Vick, nor the will of Grey Jenkins Vick, gave to Henry W. Vick the power to make partition. The substance of those instruments, so far as relates to the question under consideration, has been recited. By the deed of Sarah Vick, the trustee therein named was directed to permit her husband, Henry W. Vick, as his agent, and as agent and trustee for herself and her children, "to superintend, possess, manage, and control said property for the benefit of all concerned." And it is added, "Said Henry W. Vick is to

have power to sell and exchange said property after the death of said Sarah Vick, and to apply the proceeds to the payment of the debt due to the trustees of the Bank of the United States; if such debt is paid, the proceeds of the sale to be re-invested and be subject to the trusts of this deed." The codicil to the will of Grey Jenkins Vick, made Henry W. Vick a trustee for his, Henry W. Vick's, children, and gave him full power to dispose of all or any portion of the property devised by said will, which might fall to said Henry's children, and to invest the proceeds in such manner as he might think proper for their benefit. These were the express powers granted. Henry G. Vick, one of the children, came of age and demanded his portion separate from the rest. No question is made about his right to have such division made. Had Henry W. Vick no power to co-operate with him in making such a division? That is the question. In the one case power is given to sell and exchange, superintend, possess, manage, and control for the benefit of all concerned; in the other, full power to dispose of all or any portion, and invest the proceeds in any manner he might think proper for the children's benefit.

The question whether a naked power to sell or exchange implies a power to make partition is discussed by Sir Edward Sugden in his work on Powers. He says: "It is clear that a power to make partition of an estate will not authorize a sale or exchange of it; but it has frequently been a question amongst conveyancers, whether the usual power of sale and exchange does not authorize a partition, and several partitions have been made by force of such powers under the direction of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of *Abell* v. *Heathcote*, 4 Bro. C. C. 278; 2 Ves. Jun. 98. Mr. Fearne thought the power did authorize a partition, on the ground that a partition was in effect an exchange." Sugden adds, that the lords commissioners, Eyre, Ashurst, and Wilson, before whom the case was first heard, all thought that the power was to receive a liberal construction, as its object was to meliorate the estate. Eyre thought, that upon the word *sell*, the trustees should have a power of making partition, because it was in effect to take quite a new estate. Ashurst and Wilson thought, that what-

ever power might be derived from the word *sell*, the other words of the power, *convey for an equivalent* (which were also used), were sufficient. But they made no decision. Upon the cause coming before Lord Rosslyn, he determined that the power was well executed, and founded his opinion upon its being in effect an exchange, as the consequences and effects of a partition and an exchange, as to the interests of the parties, are precisely the same. Sir Edward then notices the decision of Lord Eldon in the case of *McQueen* v. *Farquhar* (11 Ves. 467), that a power to *sell* simply, does not authorize a partition. He then adds: "Until the question shall receive further decision, it can scarcely be considered clear that a power to exchange will authorize a partition;" but he proceeds to show that the decision in *Abell* v. *Heathcote* must have been based on the power to exchange, and not on any additional words. After referring to the case of *Attorney-General* v. *Hamilton* (1 Madd. 122), which was not decisive of the point, Sugden closes his discussion by saying: "But, as Lord Rosslyn has observed, this objection may be obviated where there is a power of sale. The undivided part of the estate may be sold, the trustees may receive the money and then lay it out in the purchase of the divided part, and although the sale is merely fictitious in order to effect the partition, it should seem that the transaction cannot be impeached." 2 Sugden, Powers, 479–482 (7th ed.), 1845.

We have quoted more largely from Sugden's work because of his great authority on questions of real estate and equity. It will be seen that he regards it as doubtful whether the power to make partition is included in the power to sell and exchange; but that partition may be effected indirectly under the power to sell, by actually selling the undivided interest, and purchasing a separate interest with the proceeds. The last edition of Sugden on Powers, published in 1861, has no change in the text on this subject.

In the case of *Doe* v. *Spencer* (2 Exch. Rep. 752), decided in 1848, Baron Rolfe, afterwards Lord Cranworth, speaking for the court, held, in accordance with Mr. Preston's note to Shepherd's Touchstone, p. 292, that two tenants in common might effect a partition by the exchange of a moiety in one part for a moiety in the other part; and thence concluded that

a power of exchange given to trustees would be sufficient to enable them to effect a partition with their co-tenant in this way; although it was supposed that between more than two parties it could not be done. Vice-Chancellor Kindersly, in a subsequent case, reviewing this decision of the Court of Exchequer, well remarked, that if this can be done between two tenants in common, there seems to be no good reason why it may not be done between three or more.

The plaintiffs place great reliance on the case of *Brassey* v. *Chalmers* (16 Beav. 223), in which the master of the rolls held that a power to sell and dispose did not give the power to make partition; at least he refused to compel a purchaser to accept a conveyance where such a partition had been made. The case, however, was appealed, and the lords justices, without deciding the point, suggested the filing of a bill for partition, upon which the partition made might be confirmed, if found beneficial. This course was adopted, and resulted in a confirmation of the partition, and a decree confirming the title. 4 DeG. M. & G. 528; S. C., 31 Eng. L. & Eq. R. 115. So that this case left the point still undetermined. This was in 1853, and no notice of the case is taken in the last edition of Sugden on Powers, published in 1861.

A review of the cases and text-books on this subject was made by Vice-Chancellor Kindersly in 1856 in the case of *Bradshaw* v. *Fane* (2 Jur. N. S. 247), and the conclusion to which he came was, that it was still doubtful whether a power to sell and exchange would, or would not, authorize a partition. The same thing is stated in Lewin on Trusts and Trustees, 8d ed., p. 417.

In a recent case, however, *In re Frith and Osborne* (3 Ch. D. 618), decided in 1876 by Sir George Jessel, master of the rolls, it was distinctly adjudged, after a masterly review of all the previous authorities, that a power to sell and exchange does include the power to make partition. In delivering his judgment, the master of the rolls concludes as follows: "This is the state of the authorities. Lord St. Leonards says that it wants another decision to make it quite clear. I am willing to give the decision (supposing the doubt is not taken away by the decision of the Court of Exchequer followed by the vice-

chancellor, Kindersly) that the passage in the Touchstone [declaring that joint-tenants, tenants in common, and co-parceners cannot exchange the lands they do so hold, one with another, before they make partition] is not good law, and that you can have such an exchange, and if you can have such an exchange, why could not the power authorize the exchange of an undivided moiety in Whiteacre for another undivided moiety in Blackacre? I decide that it does. We have conflicting opinions between what the judges said in *Doe* v. *Spencer* and what the vice-chancellor intimated his opinion to be. It is not necessary for me to decide that question. I must say, if I had to decide it, I should be inclined to follow the opinion of the vice-chancellor instead of the Court of Exchequer, for if it can be done as between two, I do not see why it could not be done as between more than two, but I have not to decide that question now."

It would seem, therefore, to be finally settled in England, that a power to sell and exchange does include the power to make partition, and that all doubt on the subject has been removed; and we have not been referred to any decisions in this country which lead to a contrary result. This disposes of the case so far as the power under the deed of Sarah Vick is concerned.

The power given to the trustee by the codicil to the will of Grey Jenkins Vick is not quite so clear. The testator constituted Henry W. Vick a trustee for his children, and gave him full power to dispose of all or any portion of the property devised in the will that might fall to them, and invest the proceeds in such manner as he might think proper for their benefit. The expression "to dispose of" is very broad, and signifies more than "*to sell.*" Selling is but one mode of disposing of property. It is argued, however that the subsequent direction to *invest the proceeds* indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the

lands parted with; and the lands received would be the proceeds. It is to be considered that the words used are contained in a will, to which the rules of construction applicable to ordinary speech are to be applied, except where technical terms are employed. In a well-considered book on the construction of wills, the rule of interpretation is laid down thus: 1. "In construing a will, the words and expressions used are to be taken in their *ordinary*, *proper*, and *grammatical* sense; — unless upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the court, arises; in which case the primary meaning of the words may be modified, extended, or abridged, and words and expressions supplied or rejected, in accordance with the presumed intention, so far as to remove or avoid the difficulty or ambiguity in question, but no farther." 2. "As a corollary to, or a part of, the last proposition, — *technical* words and expressions must be taken in their *technical* sense, unless a clear intention can be collected to use them in another sense, and that other can be ascertained." Hawkins, Construction of Wills, pp. 2, 4.

Now, whilst it may be true that when the words "disposed of" are used in connection with the word "sell," in the phrase "*to sell and dispose of*," they may often be construed to mean a disposal by sale; it does not necessarily follow that when power is given generally, and without qualification by associated words, to dispose of property, leaving the mode of disposition to the discretion of the agent, that the power should not extend to a disposal by barter or exchange, as well as to a disposal by sale. The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical signification. Taking the whole clause in the codicil together, it is equivalent to an authority to dispose of the property as the trustee should deem most for the interest of his children; and this would include the power to barter or exchange as well as the power to sell.

In re Frith and Osborne, already cited, the terms of the power were "to *sell*, *dispose of*, convey, and assign the tenements, or any part thereof, by way of absolute sale for such a price in money, or by way of *exchange* for such equivalent in lands, as to the trustees should seem reasonable." The master

of the rolls, in analyzing this phraseology, said: "Of course the word 'sell' refers to 'sale,' and the word 'exchange' refers to 'dispose of,' and, therefore, it comes to this, whether a trust including a power to dispose of by way of exchange for an equivalent in other lands, authorizes trustees to dispose of the undivided moiety, which they are empowered to dispose of, for another undivided moiety." This quotation shows that the words "dispose of" are properly applied to an exchange.

If this construction of the language of the will is correct, the conclusion arrived at in relation to the power given by the deed of Sarah Vick is applicable to that given by the will; for, since it imports a power to exchange, it likewise imports a power to make partition.

But without assuming to lay down as a general rule the interpretation which we have suggested, in view of the clearly expressed opinion of the Supreme Court of Mississippi on the precise point, we feel justified in adopting it in this case. In disposing of the equity case on appeal, that court fully considered the power of the trustee, Henry W. Vick, both under the deed and under the will, and came to the unanimous conclusion that he had full power and authority to make the partition in question. As to the power under the will the court had no doubt, and as to that given by the deed they relied on the authority of *Abell* v. *Heathcote* and the opinions of Sugden and Fearne. And although this conclusion was not embraced in the decree so as to become *res judicata*, yet it was the ground on which the decree was rested. The precise question before the court was, whether the power exercised by the trustee was or was not clearly in excess of powers given by the instruments under which he assumed to act. The court looked into these instruments, and said, without hesitation: "The trustee acted entirely within the scope of his powers, and therefore it is not clear that he acted in excess of those powers, but the contrary." Whilst the point adjudicated was the conclusion that he had not clearly exceeded his powers, the reason for that conclusion, namely, the decided opinion that he had acted within the scope of his powers, was fairly within the inquiry presented for determination. The opinion is not absolutely binding, it is true, but it is entitled to great

weight on the question as to the actual law of Mississippi, and can hardly be called an extra-judicial opinion.

The objection that the trustee did not give his personal attention to the division of the property, but, by agreement with his son, submitted it to the arbitrament of disinterested persons, we do not regard as sufficient to invalidate the transaction. It was confirmed and carried into effect by his executing the requisite indenture for that purpose. Had the matter been carried into the courts a commission would have been appointed to make the partition, in whose appointment the trustee would have had less to say than he had in the selection of the persons mutually chosen by himself and his son. And it seems to us that the intervention of disinterested persons for appraising the property and making the allotment was judicious and proper. It is the course most commonly pursued by those who desire to make a division of property. It is laid down as a rule that "trustees may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it;" and this is said to arise "from the usage of mankind. If the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as, if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents." Lewin on Trusts and Trustees, 3d ed., p. 293. Again: "The trustee cannot without responsibility delegate the general trust for sale; but there seems to be no objection to the employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestui que trust* as he would have done for himself." Id. p. 422.

But this is rather a question affecting the responsibility of the trustee than the validity of his acts. The trustee in this case had power to make partition. He did make partition, and carried it out by executing the proper conveyance between himself and his co-tenant. The partition is valid, although the trustee may be responsible for the manner in which it was effected by him.

Decree affirmed.

THE "SABINE."

Salvors can not in the same libel proceed *in rem* against a vessel and *in personam* against the consignees of her cargo.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. R. H. Browne and *Mr. C. B. Singleton* for the appellants.
Mr. John A. Campbell, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture.

Three elements are necessary to a valid salvage claim: 1. A marine peril. 2. Service voluntarily rendered when not required as an existing duty or from a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success.

Proof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes, or, in case of capture, if it is not retaken, no compensation will be allowed. Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services voluntarily rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property.

Sufficient appears to show that important assistance was rendered by the steamer "Mayflower" and her crew to the steamer "Sabine," in the nature of salvage service, as alleged in the libel. Both steamers were at the time in the Ouachita River, and each was bound on a trip to the port of New Orleans. When the "Mayflower" approached the landing described in the libel, those in charge of her deck discovered that the steamer

"Sabine" was in distress, and it appears that those in command of the latter steamer hailed the "Mayflower" and requested assistance. It also appears from the pleadings that the injured steamer had a cargo of six hundred and nineteen bales of cotton, consigned to various merchants at the port of destination, together with a number of passengers; that she and her cargo were in peril, owing to the fact that in attempting to back out from the landing she struck a snag or other obstruction beneath the surface of the river and became fast. Many of her flooring timbers and bottom planks were broken, and it is alleged that she had in her hold sixteen to eighteen inches of water, which was rapidly gaining on her pumps.

Success attended the efforts of the salvors, both as to the steamer and her cargo, and they delivered all the cotton to the consignees. Before the cargo was delivered to the consignees they executed to the master of the "Sabine" an average bond, agreeing to pay their respective proportions of whatever sums should be found due as expenses, charges, and sacrifices in consequence of the said disaster.

Efforts to settle the matter amicably having failed, the owner, master, and crew of the "Mayflower" filed a libel in the district court against the steamer "Sabine" and her cargo and the several consignees to whom the cargo was delivered. Process issued, and the return of the marshal shows that he seized the injured steamer. Service was also made upon the several consignees, but it is not shown that the cargo saved or any part of it was ever seized.

Due appearance was entered by the respective consignees, and they filed certain exceptions to the libel. Those still relied on are as follows: 1. That there was no seizure of the cargo and that a libel *in rem* cannot be maintained without a seizure. 2. That the consignees are not proceeded against as owners or possessors of the cargo. 3. That a suit *in personam* and a suit *in rem* cannot be maintained in such a case. 4. That a suit *in personam* for salvage services must be against those for whom the services were performed. 5. That the respondents are consignees, and that the cargo had been disposed of and accounted for to those who owned the cotton.

Hearing was had, and the district court sustained the excep-

tions and dismissed the libel as to the excepting parties. Dissatisfied with the decree of the district court the libellants appealed to the circuit court, where they were again heard, and the circuit court affirmed the decree of the district court. Still not satisfied the libellants have appealed to this court, and now assign for error that the circuit court erred in holding that the nineteenth admiralty rule applies to the case, because, as they insist, that the libel in this case is not a suit *in rem* and *in personam* within the meaning of that rule, and that the exception should have been dismissed.

Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed. Power is vested in the Supreme Court to regulate the practice to be used in suits in equity or admiralty by the circuit or district courts as conferred by an act of Congress, which has been in force for many years. 5 Stat. 518; Rev. Stat., sect. 917.

Pursuant to that authority the Supreme Court prescribed the preceding rule, which correctly describes the several modes in which salvors may seek compensation for unrequited salvage services. Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit *in rem* against the ship or cargo, or both where both are saved in whole or in part. Such a remedy is the one usually pursued, and in view of the fact that the lien is maritime and exists quite independently of possession, it ordinarily affords the best mode of securing the payment of their salvage claims. Williams & Bruce Prac., 147. *The Elizabeth and Jane*, 1 Ware, 35; *The Bee*, id. 332, 344. Suits of the kind may be enforced against the proceeds of the property, where it appears that the property saved had been previously seized under admiralty process and sold, and the proceeds paid into the registry of the court. Examples of the kind may be given, as where the property saved consisting of the ship and cargo, and the same were subsequently seized for a violation of the revenue laws, and sold as perishable property before the libel for salvage was instituted, or where there were more than one set of salvors, and the first set caused the property to be seized and sold under

an order of court before the second obtained process of attachment. Cases of the kind not infrequently arise, and in all such the proceeds in the registry of the court represent the property saved, and it is clear that the suit may be against the proceeds, as provided in the nineteenth rule. *The Blackwall*, 10 Wall. 1, 12; *The Ship Ewbank*, 1 Sumn. 400.

Services of the kind are often rendered by more than one set of salvors, and where that is so, the second, if they do not join with the first set, may, as before remarked, proceed against the proceeds, or they may, pending the proceeding in the suit, apply to the court by petition to be admitted as parties to the original libel. *Adams* v. *Bark Island City and Cargo*, 1 Cliff. 210; *Norris* v. *Bark Island City and Cargo*, 1 id. 219.

Compensation in such a case is usually enforced by a libel *in rem*, but where the parties rendering the salvage service are employed and sent out by the owners or insurers, the persons employed may proceed *in personam* against their employers for compensation, even though they were unsuccessful, unless they contracted that their right to compensation should depend upon their success, as in the ordinary case of salvage service, without being antecedently employed.

Employers, in such a case, are liable to those rendering service, under such circumstances, in a suit *in personam*, within the last clause of the admiralty rule, but there is no authority for holding that salvors may proceed against the ship and cargo *in rem* and *in personam* against the consignees of the cargo in the same libel.

Libellants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or the owner alone, but the terms of the nineteenth rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

Important service, it may be assumed, was rendered by the libellants, but they were neither employed nor sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Concede that the request of the master for assistance would

be sufficient to enable the salvors to maintain an action *in personam* against the owners of the property, still the concession will not benefit the libellants in this case, as the libel is against the ship and cargo and the consignees to whom the cargo was delivered; nor would they be in any better condition even if they had joined the owners instead of the consignees, as the difficulty would still remain that the proceeding is *in rem* against the ship and cargo and *in personam* against the owners of the cargo, without joining the owners of the ship.

Persons to whom goods are consigned may be the owners of the goods, or the goods may be the property of the consignors, or they may even belong to a third party, the fact being that the consignees are named in the bill of lading merely as agents of the shipper to deliver the goods in pursuance of some letter of advice. Nothing appears in this case to explain the transaction, except that it is alleged in the libel that the different parcels of the cargo when rescued were delivered to the several respondents therein described as consignees.

Authorities may doubtless be found to support the proposition that the salvors may proceed *in rem* against the ship and cargo or *in personam* against the owners of the property saved from the impending peril, but there is no well-considered authority which gives any countenance to the theory that the two modes of proceeding may be joined in the same libel. *The Schooner Boston*, 1 Sumn. 328, 341; *The Hope*, 3 C. Rob. 215.

Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party, but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other.

Our admiralty rules were promulgated in accordance with the act of Congress, and, as Mr. Parsons says, they have all the effect of law, from which he draws the conclusion that no suit in such a case will lie against an owner *in personam* jointly with a suit *in rem* against the vessel. 2 Parsons' Admr. 378; *Dean*

v. *Bates*, 2 Woodb. & M. 87, 92; *The Atlantic and The Ogdensburgh*, 1 Newb. Adm. 139.

Beyond all doubt the views of Mr. Parsons are sustained by the true construction of the nineteenth admiralty rule, which is expressed throughout in the disjunctive form, and plainly requires the action, if against the property saved or the proceeds thereof, to be *in rem*, the alternative clause clearly referring to a case where the property saved has been sold and the proceeds of the sale have been deposited in the registry of the court. Plain as that part of the rule is, further discussion of it is not necessary, as the libellants scarcely attempt in that regard to controvert the theory of the respondents.

Suppose the respondents are correct in that respect, still the libellants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libellants, must show the request and the benefit, and unless they show that both concur they cannot make out a case even within their own theory, to which it may be added that the libel is against the consignees and not against the owner, unless it can be assumed that the consignees are the owners of the cargo, which certainly is not authorized by any thing that appears in the transcript.

But there is not a circumstance in the case tending to show that any such request was made, either by the consignees of the cargo or the owners of the same, nor can it for a moment be admitted that such an action can be maintained either against the consignees or the owners merely because the saving of the cargo resulted to their benefit. Volunteer assistance rendered to such property when in peril, and which is successful in saving the property or some portion of it, constitutes the proper foundation to support an action for salvage *in rem* against the ship and cargo or the proceeds thereof.

Reported cases may be found where the owners or insurers of

such property, being informed that the property was in peril, sent out vessels and mariners for its assistance and relief, and in such a case it is undoubtedly true that the persons employed, both for their own services and for the use of the vessel or other appliances, may maintain a libel *in personam* to enforce the payment of just compensation for all such services.

There is a broad distinction, said Dr. Lushington, between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress they are to be paid according to their efforts, even though the labor and service may not prove beneficial to the vessel or cargo. *The Undaunted*, 1 Lush. 90.

No one can doubt that for such service the proper remedy is an action *in personam*, as provided in the last clause of the admiralty rule prescribing the mode of procedure to recover salvage compensation. Unless the property saved is destroyed after having been restored or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action *in rem* against the property, as their compensation cannot exceed its value, and if destroyed without their fault or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed *in personam* against the owners of the salved property, though the case is not specifically provided for in the nineteenth rule, to which reference has been made. *The Emblem*, 2 Ware, 61; *The Schooner Boston*, *supra;* Dunlap, Prac. 511; *The Trelawney*, 3 C. Rob. 216, note.

Mere employment to render such a service is no bar to such a libel, the rule being that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will defeat the jurisdiction of the admiralty court. *The Camanche*, 8 Wall. 448, 477.

Compensation for such services, if voluntarily rendered, cannot exceed the value of the property saved, and for that the

salvors have a maritime lien on the property independent of possession, and which continues until the compensation is paid, so long as the property remains in specie. Maclachlan, Ship. (2d ed.) 593; *The Gustaf*, 1 Lush. 506; Maude & Pollock, Ship. (3d ed.) 487.

Viewed in the light of these suggestions it is clear to a demonstration that the decision of the Circuit Court is correct. *Nott* v. *Sabine & Cargo et al.*, 2 Woods, 211.

Decree affirmed.

GAY *v.* PARPART.

1. Where an appeal has been taken to this court the condition of the bond that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said court," meets all the requirements of Sect. 1000 Rev. Stat.
2. In such a case the court will not entertain a motion by the appellee to affirm the decree appealed from.

MOTION to vacate the *supersedeas* and dismiss an appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. George Herbert and *Mr. Lawrence Proudfoot*, in support of the motions.

Mr. Lyman Trumbull, *Mr. Edward S. Isham* and *Mr. Robert T. Lincoln*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

These motions are founded on an alleged defect in the form of the condition of the bond. By sect. 1000 Rev. Stat., the security to be taken on a writ of error or an appeal, where the writ or the appeal is a *supersedeas* and stays execution, must be "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs." The condition of the bond in this case is, that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount

of costs and damages rendered and to be rendered in case the decree shall be affirmed in said Supreme Court."

The object of the statutory requirement undoubtedly is to secure to the opposite party his damages and costs, in case the judgment or decree shall not be reversed, and that, we think, is the legal effect of this bond. If, on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect. In our opinion the language of the bond covers fully all the requirements of the statute. The motions to dismiss the appeal and vacate the *supersedeas* are, therefore, overruled.

The appellee has coupled with a motion to dismiss, a motion, under Rule 6, to affirm, because it is manifest that the appeal was taken for delay only. Clearly this is not a case for the application of that rule.

Motions denied.

WHITNEY v. WYMAN.

1. Where a party who discloses his principal and is known to be acting as an agent, enters as such into a contract, he is not liable thereon in the absence of his express agreement to be thereby bound.
2. Where a corporation, organized pursuant to the provisions of a statute, but before its articles of association were filed with the county clerk, entered into a contract for certain machinery to enable it to carry on its business. *Held*, that its subsequent recognition of the validity of the contract, was binding upon it although the statute declares that a corporation so organized shall not commence business before such articles are so filed.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. J. W. Champlin for the plaintiff in error.
Mr. Mitchell J. Smiley, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This action was brought to recover the value of certain

machinery manufactured by Whitney, which he alleged he had sold and delivered to Wyman and the other defendants.

The defendants insisted that they had contracted for and received the machinery in behalf of a corporation of which they were officers, and that hence were not personally liable.

The plaintiff lived in Massachusetts and the defendants in Michigan.

The latter addressed a letter to the former, which was as follows: —

"GRAND HAVEN, Feb. 1, 1869.

"BAXTER WHITNEY, ESQ., Winchenden, Mass.:

"SIR, — Our company being so far organized, by direction of the officers, we now order from you, manufactured and shipped, at as early date as possible — for the manufacture of the Mellish fruit basket — 1 large rounding lathe, 1 quart do. do., 2 lathes for peach basket bottoms, 3 do. do. quart do. do., pint do. do. Also the necessary small fixtures for clasping, &c., of which Mr. Whitney is advised, and will give you more definite order.

"CHARLES WYMAN,
"EDWARD P. FERRY.
"CARLTON L. STORRS,
"Prudential Committee Grand Haven Fruit Basket Co."

To which the plaintiff replied: —

"WINCHENDEN, MASS., Feb. 10, 1863.

"GRAND HAVEN FRUIT BASKET COMPANY:

"GENTLEMEN, — Yours of the 1st inst. is received, in which you order machinery for fruit baskets, &c. I had already anticipated your order by commencing on the machinery on Mr. Whitney's verbal order, and I am now driving it with all the force I can get on it.

"Yours respectfully, BAXTER D. WHITNEY."

The plaintiff wrote further, as follows: —

"WINCHENDEN, April 14, 1869.

"MESSRS. C. E. WYMAN, E. P. FERRY, C. L. STORRS:

"GENTS, — I herewith send bill of machinery ordered by you Feb. 1st, and have drawn on you at sight for the amount, $6,375. The machinery was delayed two days in order to get into one of the blue line cars. It has gone from the depot now and I have to send

to Fitchburg for through bill of lading, which I expect to-night, and will forward it as soon as I procure it.

"Yours respectfully, BAXTER D. WHITNEY."

The plaintiff charged the defendants individually on his books for the machinery. His draft was protested, and he thereupon wrote as follows: —

"WINCHENDEN, MASS., May 14, 1869.

"MESSRS. CHARLES E. WYMAN, EDWARD P. FERRY, CARLTON L. STORRS:

"GENTS, — I have just received notice of protest of my draft on you. Reason given, machinery not arrived. I doubt not the machinery has arrived before now, and if so, I hope you will forward me draft on New York at once. I need the money very much, from the fact that parties here on which I relied for money have been burned out and they are unable to pay me at present.

"Yours respectfully, BAXTER D. WHITNEY."

The last two letters were not answered.

The machinery was delivered at Grand Haven, and the freight was paid by Edward P. Ferry as the treasurer of the corporation. The draft of Baxter was protested, because it was addressed to the drawees individually. They claimed that he had no right so to draw on them.

The corporation was organized under a statute of Michigan which authorized mining and manufacturing companies to be created pursuant to its provisions. It took the name of "The Grand Haven Fruit Basket Company."

On the 5th of January, 1869, thirty-two stockholders, including the defendants, subscribed the articles of association and acknowledged their execution before a notary public.

On the 21st of the same month there was a meeting of the stockholders, at which a code of by-laws was adopted. It provided for the election of seven directors, and of a president, secretary, and treasurer; and that the directors should elect out of their number one who, with the president and treasurer, should be a prudential committee, and that the committee should be charged with such duties as might be devolved upon it by the board of directors. The defendants and four others were elected directors.

On the 25th of the same month the board of directors elected the defendant Storrs president, the defendant Ferry treasurer, and the defendant Wyman for the third member of the prudential committee.

The articles of association were filed with the Secretary of State on the 19th of February, 1869, and with the county clerk on the 12th of May following. The statute declares that they shall be so filed before the corporation shall commence business. The notary public who certified the acknowledgment of the articles was himself a subscriber, and his name is included in his certificate. It was proved, by parol evidence, that the directors authorized the prudential committee to contract for the machinery.

The corporation received the machinery, bought an engine to run it, manufactured baskets with it, and carried on the business until some time in the year 1870.

On the 3d of March, 1870, Lyman and Fairbanks, two of the directors, were authorized to settle with the plaintiff on the best terms they could obtain.

The court instructed the jury in substance, that the letter of the prudential committee of Feb. 1, 1870, bound the corporation and not the defendants, if there was then a corporation and the defendants were authorized by it to give the order, and that if the corporation had acted as such and exercised its franchises, then it was a corporation *de facto*, and that in such case any irregularity in its organization was immaterial.

The plaintiff excepted to these instructions, and took numerous other exceptions in the course of the trial, which are set forth in the record.

The jury found for the defendants; and judgment having been entered for them, Whitney removed the case here.

Where the question of agency in making a contract arises there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. *Stanton* v. *Camp*, 4 Barb. (N. Y.) 274.

In the latter cases the question is always one of intent; and

the court, being untrammelled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise.

The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.

Looking at the letter of the defendants of the 1st of February, 1869, and the answer of the plaintiff of the 10th of that month, we cannot doubt as to the understanding and meaning of both parties with respect to the point in question.

The former advised the latter of the progress made in organizing the corporation; that the order was given by the direction of its officers, and the letter is signed by the writers as the "Prudential Committee of the Grand Haven Fruit-basket Co.," which was the name in full of the corporation. The plaintiff addressed his reply to the "Grand Haven Fruit-basket Company," thus using the name of the corporation as the party with whom he knew he was dealing, and omitting the names of the defendants, and their designation as a committee, according to the style they gave themselves in their letter.

It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually.

The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Utley* v. *Donaldson*, 94 U. S. 29.

But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association, as required by the statute.

To this objection there are several answers.

The corporation subsequently ratified the contract by recognizing and treating it as valid.

This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. Angell & Ames, Corp., sect. 804 and note.

The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. Id. sect. 635 and note.

The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity. *National Bank* v. *Matthews*, 98 U. S. 621.

The instruction given by the court to the jury with respect to acts of *user* by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff. Angell & Ames, Corp., sect. 635.

The record shows clearly that the plaintiff was not entitled to recover, and that the verdict and judgment are right. We, therefore, forbear to examine the other assignments of error. Conceding that all the exceptions to which they relate were well taken, the errors could have done him no harm. *Barth* v. *Clise, Sheriff*, 12 Wall. 400.

Judgment affirmed.

ALDRIDGE v. MUIRHEAD.

1. Where lands in New Jersey, paid for out of the separate estate of a married woman are conveyed to her, she is considered to be the owner of them, as if she were a *feme sole*.
2. Under the laws of that State the separate property of a woman may, with her consent, be managed by her husband, without necessarily subjecting to the claims of his creditors it, or the proceeds which by reason of his management arise therefrom.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

The facts are stated in the opinion of the court.

Mr. Robert Gilchrist for the appellant.
Mr. Cortlandt Parker, and *Mr. John Linn*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit in equity brought by the assignee in bankruptcy of Thomas Aldridge, to reduce to his possession, as part of the estate, property standing in the name of Anne Aldridge, the wife of the bankrupt. The theory of the bill is that the bankrupt, while largely indebted, purchased the property in controversy with his own means, and took the title in the name of his wife to keep it away from his creditors.

New Jersey has been among the most liberal of the States in modifying the rules of the common law prescribing the rights of the husband in the property of his wife and in protecting her against the claims of his creditors. In 1851 a widow was given the right to demand from the personal representative of her deceased husband all personal property which at or immediately before her coverture belonged to her, or which came to her during coverture by bequest, gift, or inheritance, if it remained in his possession at the time of his death. Laws of 1851, p. 201. In 1852 it was enacted that a married woman might receive by gift, grant, devise, or bequest, and hold for her sole and separate use, real and personal property, and the rents, issues, and profits thereof, and that her sole and separate property should not be subject to the disposal of her husband or liable for the payment of his debts. Laws of 1852, p. 407. In 1857 married women were authorized to bind themselves by covenants in conveyances of their lands, provided their husbands joined with them in the deed (Laws of 1857, p. 485), and in 1862 it was enacted that if a married woman transacted business or purchased property, and thereby contracted debts, she might be sued at law for the recovery of the amount, and that any judgment thus obtained should bind her property. Laws of 1862, pp. 271, 272.

It is conceded by the counsel for the appellee that the circuit judge expressed the law of the State accurately when he said in his opinion, filed with the record, that "the courts of the State, in numerous decisions, have construed it (the act of 1852) to authorize the acquisition by a married woman of personal prop-

erty and real estate, and to intercept the common-law right of her husband to reduce her personal property to possession, and to appropriate the rents, issues and profits of her real estate, as an incident of his initiate estate by the curtesy." Another principle stated by the circuit judge is also conceded to be correct. It is as follows: "When therefore (in New Jersey), the title to real estate is conveyed to a married woman she must be considered the bona fide owner of it, as if she were a single female. But it must be entrenched in the real good faith by which an honest acquisition is distinguished. If it is purchased by her or for her, no matter by whom, and is paid for out of her separate estate, its validity cannot and ought not to be questionable. But if she has no separate estate, or that is disproportionately small compared with the consideration ostensibly furnished by her, and her means are materially supplemented by her husband's contribution from resources, whether money or its equivalent, which he could not rightfully so apply, such a transaction does not specially invite, as it certainly does not deserve, any legal sanction." It is equally true that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors. *Voorhees* v. *Bonesteel and wife*, 16 Wall. 16.

Such being the law of the case we come now to consider the facts. Mr. and Mrs. Aldridge, the appellants, were married in 1842. The wife had at the time money and personal property amounting to about one thousand dollars, which came to her by inheritance from a deceased relative. The most of this was invested soon after in furniture for the home of the family. The husband was an instrument-maker by trade, but at some time before 1857 left that business and engaged in the manufacture of oakum. In 1857 his factory was burned, and being unable to collect his insurance money on account of the insolvency of the company in which his property was insured he failed and became utterly insolvent. After giving up all his property to his creditors he remained largely in debt. Confessedly in the early part of 1861 he had nothing. In May of that year he was appointed postmaster at Hudson City, New Jersey. The emoluments of this office were then considerably

less than a thousand dollars a year. He was also a real estate agent and conveyancer.

During that year Mrs. Aldridge received about four hundred dollars from her father's estate in England. In September, a friend of the family had a lot for sale with a barn on it. The price was three hundred and fifty dollars, and the terms easy. A purchase of this lot was made in the name of the wife. Not more than twenty-five dollars, if that, was paid down. The balance of the purchase-money was secured by assuming a mortgage already on the lot for two hundred and fifty dollars, and giving another mortgage, in which the husband and wife joined, for seventy-five dollars. Mrs. Aldridge, with the money she had received from her father's estate, and more which she borrowed from a maiden sister, converted the barn on the lot into a house. The cost of this was between ten and twelve hundred dollars, and the house was occupied by the family as a residence until 1869, when it was sold with the lot for something more than four thousand dollars.

In the course of the years 1863 and 1864, some female friends of Mrs. Aldridge, countrywomen of hers, loaned her nineteen hundred dollars — one furnishing seven hundred, and the other twelve hundred dollars. She also borrowed further sums from her sister, who was frequently an inmate of the family, and seems to have had money. The precise sum got from her sister does not appear, but the evidence leaves no doubt in our minds that with this and the other sums borrowed, she had as her separate capital more than three thousand dollars.

During the years 1863, 1864, and 1865 five different purchases of property were made in her name. The aggregate of all these, except the last, was only a little more than three thousand dollars, and credit was given on much of the purchase-money. Some sales were made in the mean time and a little profit realized. The last of the five purchases was made in January, 1865. The money needed to make up what was wanted for the down payment was raised by a mortgage of one of the previous purchases. The property embraced in the last purchase was sold in the early part of 1866, and a profit of nearly four thousand dollars realized. Many other purchases were made afterwards, but it is conceded that the money to

make the payments came directly or indirectly from the returns of this last fortunate transaction.

While it may not be in all cases quite clear from what particular source the money came that was used in paying for each one of the earlier purchases, the testimony leaves no doubt with us, that, as a whole, they were paid for from the loans made to the wife by her sister and friends, and that all the property she now has is the result of a judicious employment of the capital she thus acquired and its legitimate profits. While the negotiations were all made by the husband, the titles were openly taken in the name of the wife. The appellants were called on to answer whether the purchase-money, or any part of it was paid from the means of the husband, and they stated, under oath, most unequivocally, that it was not. This throws the burden of proof on the complainant, and, after a full and careful examination of the whole case, we are unable to find that any thing which the creditors of the bankrupt could have subjected to the payment of their debts ever went into the property that the wife now holds. Undoubtedly the husband's services were largely the cause of the fortunate results; but, so far as we have been able to discover, they were devoted to the management of what was both in law and in fact her separate property. Her accumulations from that source do not belong to his creditors.

To our minds it is an important element in this case that the transactions out of which this suit arose, commenced thirteen years or thereabouts, before any attempt was made to impeach them. They were always open, and no effort at concealment was ever made. All deeds were taken in the name of the wife and promptly put on record. The husband's connection with all the purchases and sales must have been well known. The character of his own business must also have been understood. His bank accounts show that he was a large daily depositor in his own name. His checks were numerous and sometimes for considerable amounts. He seems sometimes to have been employed in the course of his business as land agent by heavy property owners. All his debts must have been contracted as early as 1857, and he was not adjudged a bankrupt until 1873. During all the time between these dates it is not shown that

any one ever attempted to interfere with his own business or to reach the property in the name of his wife, some of which she had held six or seven years. This can be explained in no other way than upon the assumption that the creditors knew the money he was depositing was not to any considerable extent, his own, and that his transactions in the name of his wife were in fact what they purported to be, the result of a judicious management of her separate estate. After such delay we are not inclined to set aside what has been permitted to remain so long undisturbed, simply because of an inability to explain with exact certainty from what precise source the money came which went into the purchase of each particular parcel of property. It is sufficient for the purposes of this case, that, with the money Mrs. Aldridge borrowed from her sister and friendly countrywomen, and the profits of her several investments, she had enough of her own, which was her separate estate, to make herself the owner of all she now has without interfering with the just rights of her husband's creditors. The consideration ostensibly furnished by her is not more than we are satisfied she had, and her means were not materially supplemented by contributions from her husband's resources that in law belonged to his creditors. Such services as he rendered in her behalf were no more than were consistent with all the obligations he was under to those to whom he was indebted, and there is no evidence to satisfy us that his own money was used to make any of the payments of purchase-money.

That the several loans, which made up the capital invested were to the wife, and not to the husband, is to our minds entirely clear. The insolvency of the husband was well understood, and it is evident from all the circumstances that the friends who made the loans would never have done so had it not been supposed that the money was to be used for the benefit of Mrs. Aldridge, and that she and her estate were to become bound for the repayment. The laws of New Jersey authorized her to contract such debts, and made her separate estate liable therefor. The signature of the husband to the notes and mortgages did not necessarily make the money or the property for which they were given his. It perfected the obligation of his wife and subjected her property to liability,

but did not transfer her separate estate to him. Unless his means were actually used to pay her debts, his creditors have lost nothing they ever had a right to claim as in law or equity belonging to them. *Conrad* v. *Shomo*, 44 Penn. St. 193; *Brown* v. *Pendleton*, 60 id. 419. As he was at the time hopelessly insolvent, it cannot for a moment be supposed that credit was given to his personal obligation. The wife and her separate estate furnished the only security the parties supposed they had for the money which was loaned.

We have thought it unnecessary to go over the details of the evidence in an opinion. The result we have unanimously reached is that the decree below should be reversed and the cause remanded with instructions to dismiss the bill with costs. It is consequently

So ordered.

BANK v. SHERMAN.

HICKLING v. SHERMAN.

On the 23d of February, 1875, certain creditors filed their petition in the District Court of the United States, praying that A. should be declared a bankrupt. On the 9th of March he appeared, and leave was given them to amend their petition, by adding new causes of bankruptcy or otherwise. On the 16th of April, he filed his answer, denying that the aggregate of the claims of the petitioners amounted to one-third of the debts provable against him. Time was thereupon allowed for other creditors to unite with the petitioners, and the previous leave to amend the petition was continued. On the 22d of that month one B. was permitted to unite with the petitioning creditors, and their petition was amended by alleging that A. within six months before the petition was filed committed, by the non-payment of his commercial paper, an act of bankruptcy. The amount of A's debts then represented, was sufficient and upon the alleged act of bankruptcy set forth in the amended petition A was duly declared a bankrupt. On the 12th of July, 1875, an assignment was made to C. as assignee which included all the property and effects of every kind in which A. "was interested or entitled to have" on the 23d of February, 1875. C. filed, July 7, 1877, his bill to reach certain securities which had been transferred by A. on or about March 20, 1875. *Held*, 1. That the continuity of the proceedings in bankruptcy was unbroken and that the assignment was operative, according to its terms, although the act upon which the adjudication was had was first alleged in said amendment to the petition. 2. That C.'s suit was not barred by the Statute of Limitations.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Julius Rosenthal and *Mr. A. M. Pence*, for bank.
Mr. Albion Cate for Hickling.
Mr. J. S. Polk and *Mr. L. H. Bisbee* for Sherman.

MR. JUSTICE SWAYNE delivered the opinion of the Court.

These are suits in equity. Our attention will first be given to the first-named case. The bill was filed by the appellee, Hoyt Sherman, as assignee in bankruptcy of Benjamin F. Allen, to reach certain securities therein described, which were transferred to the appellants by the bankrupt to secure the payment of two promissory notes of T. A. Andrews & Co., a firm consisting of T. A. Andrews and the bankrupt. One of the notes was for $15,000, and was held by the International Bank. The other was for $5,000, and was held by the appellant Hickling. On the 23d of February, 1875, a creditor's petition was filed in the District Court praying that Allen should be declared a bankrupt. On the 9th of March Allen appeared before the district judge. The hearing was postponed until the 16th of that month. Allen was given until that time to answer, and leave was given to the creditors to amend their petition, by adding new causes of bankruptcy or otherwise. Nothing further material was done in the case until the 16th of April following, when Allen filed his answer denying that the aggregate of the claims of the petitioning creditors amounted to one-third of the debts provable against him. Ten days was thereupon allowed for other creditors to unite with the petitioners, and the leave before given to amend the petition was continued. On the 22d of April following, Receiver Burley was permitted to unite with the petitioning creditors by signing the petition, which he did, and the petitioning creditors, including Burley, thereupon amended their petition. The amount of the debts of the bankrupt then represented was sufficient. The amendment set an act of bankruptcy by Allen in not paying his commercial paper within six months next preceding the time of filing the petition. An order of adjudication was duly entered, and on the 12th of July, 1875, an assignment was made to Hoyt Sher-

man, as assignee. The assignment included all the property and effects of every kind in which Allen, the bankrupt, "was interested or entitled to have on the twenty-third day of February, A.D. 1875."

The continuity of the proceeding from the outset was unbroken. The original petition was amended by inserting an act of bankruptcy which occurred before the petition was filed, as before stated, but the original petition was in no wise either dismissed or abandoned. There is no pretence for alleging either.

The assignment related back to the commencement of the proceeding, which was by filing the petition on the 23d of February, 1875, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date. Rev. Stat. 980, sect. 5,044.

This bill was filed on the 7th of July, 1877. It was amended twice, but the amendments were chiefly verbal. Their effect was only to give greater precision to the charges already made. The framework of the bill remained the same. No new cause of action was introduced. The changes were not such as could have any effect with respect to the statutory limitation as to suits by or against assignees in bankruptcy. The limitation in such a case is two years. Rev. Stat. sect. 5,057. The time begins to run when the assignee is appointed. Bump on Bankruptcy, 558. The appellee having been appointed assignee on the 12th of July, 1875, and the bill having been filed on the 7th of July, 1877, it escaped the bar of the limitation prescribed by five days. The statute, therefore, does not affect the case, and may be laid out of view. No further remarks as to this aspect of the proceeding will be necessary.

The assets involved in this controversy were transferred to the appellants on or about the 20th of March, 1875. The bill proceeds upon the assumption, and charges, that the title vested in the assignee for all the purposes of this case on the 23d of February, 1875, and that hence, when the transfer was made by the bankrupt, he had no title and no control over the property. This is denied by the appellants. They insist that as the act of bankruptcy upon which the adjudication was founded was introduced into the petition by an amendment made on the

22d of April following, the title of the assignee cannot be held to have vested at an earlier time, and that Allen, therefore, had the title when he made the transfer.

The court below held according to the theory of the bill.

The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it. In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor. The power of amendment is incident to all judicial administration. Its exercise is vital to the ends of justice. *Tilton* v. *Cofield*, 93 U. S. 163. The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise the efficacy of the act depended not upon its own language and meaning, but was only what others outside of the proceeding might choose to permit it to be. This would be a solecism, and largely defeat the purpose of the statute and the policy of Congress in enacting it. We concur entirely in the opinon of the Circuit Court upon the subject.

The bankrupt was under arrest upon civil process when the

transaction complained of by the bill occurred, and the appellants knew of the filing of the petition against him, and of his utter insolvency when they received the assets.

Our opinion in this case disposes also of the other. The record shows that the rights of Witherow were settled and provided for by a decree in another litigation to which he and the assignee were parties. The cross-bills were properly dismissed.

Decrees affirmed.

COUNTY OF LIVINGSTON *v.* DARLINGTON.

The act of the General Assembly of Illinois, approved March 5, 1867, establishing the State Reform School, examined. The provision, authorizing municipal corporations to donate money to secure the location of the school within their limits, sustained as not being in conflict with the constitution of the State, adopted in 1848, there being no settled or uniform decision to the contrary by her Supreme Court.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Robert G. Ingersoll* for the plaintiff in error.

Mr. Wayne MacVeagh, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The court is asked in this action to declare an act of the General Assembly of Illinois to be repugnant to the Constitution of that State. The act referred to was approved March 5, 1867. It established a State Reform School for the discipline, education, employment, and reformation of juvenile offenders and vagrants, between the ages of eight and eighteen years. The management of the institution was committed to a board of trustees, appointed by the Governor by and with the consent of the Senate. Cook County was excepted from the operations of the act, because a similar institution had been previously established in that county.

The board, upon its organization, was required to proceed in the selection of a suitable site, in or near the central portion of the State, on which the necessary buildings should be erected. In determining such location, the trustees were directed to take into consideration any proposition, of the performance of which they had satisfactory assurance, to give to the State the lands necessary for the site of the "house of refuge," or any materials or money to aid in the erection thereof. Any bond or other obligation executed to the people of the State, and delivered to the trustees of the institution, to secure any such site, money, or materials, the act declared, should be binding upon the parties executing the same. 1 Gross Stat. 564.

On the 19th of April, 1869, — the institution not then having been permanently located, — an amendatory act was passed, which, among other things, declared, —

That any township, county, town, or city might make a subscription in aid of the school, in money, bonds, or lands, for the purpose of securing its location within its limits;

That such subscription, if by a county, should be made by resolution, to be adopted by a majority vote of its Board of Supervisors, at a regular or special meeting thereof; if by a township, by resolution of the supervisor, town clerk, and assessor, acting as a board for the township; if by a town, by resolution or ordinance of its board of trustees; and if by a city, by a resolution or ordinance passed in the usual manner.

That no subscription should be made by a township, town, or city, except in pursuance of a popular vote, at an election called and held in the manner specified in the act; and,

That the township, county, town, or city making such subscription might provide for the payment of the principal and interest thereof, by tax upon the taxable property of such county, township, town, or city, to be levied and collected as other taxes. Id. *et seq.*

Under this legislation the county of Livingston, through its Board of Supervisors, in consideration of the location of the school within its limits, and to aid in the erection of the necessary buildings, donated the sum of $50,000, and, in payment thereof, issued county bonds, with interest coupons attached. The bonds, dated July 15, 1869, signed by the chairman and

clerk of the Board of Supervisors, under the county seal, and reciting upon their face that they were executed and issued under the provisions of the acts of March 5, 1867, and April 19, 1869, and in accordance with the resolution of the Board of Supervisors, were delivered to the trustees of the school, who caused them to be sent to Pennsylvania for sale. They were there sold, in open market, to citizens of that State, and the proceeds applied, by the State of Illinois, to the completion of the buildings connected with the Reform School.

The institution went into operation as contemplated by the legislature.

The present action was brought by Darlington upon some of the interest coupons, he, it is agreed, having become the legal holder thereof, in good faith, for a valuable consideration.

The Circuit Court gave judgment against the county.

Upon this writ of error the controlling question presented for our determination is whether the acts of the General Assembly of Illinois, under which the bonds were issued, are, as to the provisions authorizing municipal donations to secure the location of the Reform School, repugnant to the fifth section of article nine of the Constitution of the State, ratified in 1848.

That section declares that "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

The argument of counsel in behalf of the county consists mainly of two propositions, viz: —

That according to the settled construction by the Supreme Court of Illinois of the State Constitution, at the time the bonds in suit were issued, the General Assembly could not invest the corporate authorities of counties or other municipal organizations with power to assess and collect taxes for any except corporate purposes;

That it is equally well settled by the same court not to be a corporate purpose for a county or other municipal body to aid, by donation or otherwise, in the establishment of a State institution for the discipline, education, employment, or reformation of juvenile offenders and vagrants.

In determining whether the General Assembly of Illinois has transgressed the fundamental law of that State, we recall what this court said in *Fletcher* v. *Peck* (6 Cranch, 128), where it became our duty to consider whether a statute of Georgia was in conflict with its Constitution.

"The question," said Mr. Chief Justice Marshall, "whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

This language was cited with approval in *Chicago, Danville, & Vincennes Railroad Co.* v. *Smith* (62 Ill. 268), where the Supreme Court of Illinois added: —

"Enough has been cited to show the firm position of the judiciary, that the courts ought not, and in justice to the rights of a co-ordinate department of the State government cannot, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity." *Lane* v. *Dorman*, 4 Ill. 238; *People* v. *Marshall*, 6 id. 672.

Adhering to these doctrines as vital in the relations which exist between the legislative departments of the several States and the courts of the Union, we first inquire as to the state of the law in Illinois, as declared by its highest judicial tribunal, at the time (July 15, 1869) the bonds in suit were issued and put upon the market for sale.

Prior to that date it seems to have been settled by that court, —

1. In *Harvard, &c.* v. *St. Clair Drain Co.* (51 Ill. 130), that under the Constitution in force prior to that of 1848, and which contained no provision similar to sect. 5, art. 9, of the Constitution of 1848, the right of the legislature to confer upon municipal corporations the power of taxation for local or corporate purposes was constantly exercised and never denied or doubted; that sect. 5, art. 9, of the Constitution of 1848, was not, therefore, intended as a grant of such power or to remove doubts as to its existence, but to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; that, consequently, the legislature could not constitutionally confer that power upon any other than the corporate authorities of a county, township, school districts, cities, towns, and villages, or for any other than corporate purposes;

2. In *Johnson* v. *County of Stark* (24 id. 75), re-affirmed in *Chicago, Danville, & Vincennes Railroad Co.* v. *Smith, supra; Perkins* v. *Lewis*, 24 Ill. 208; *Butler* v. *Dunham*, 27 id. 473; *Town of Keithsburg* v. *Frick*, 34 id. 405, and other cases, that the subscription by a county to the capital stock of a railroad company engaged in the construction of a road running through the limits was a corporate purpose, for the accomplishment of which the corporate authorities of the county could, under legislative sanction, assess and collect taxes upon persons and property within its jurisdiction; that such aid was a corporate purpose, because in the completion of such improvements "the whole community is either immediately or remotely interested, those near the line on which it passes in a larger, and those more remotely situated in a less degree, but all participate in its benefits;" that among the corporate purposes for which a county may be taxed are court-houses, jails, poor-houses, the opening and keeping of common highways, and the erection and maintenance of bridges.

3. In *Taylor* v. *Thompson* (42 Ill. 9), followed by *Henderson* v. *Lagow* (42 id. 361), *Briscoe* v. *Allison* (43 id. 291), *Misner* v. *Bullard* (43 id. 470), and *Johnson* v. *Campbell* (49 id. 317), that a tax levied by a township under legislative authority, and in pursuance of a popular vote, to pay bounties to persons who should thereafter enlist or be drafted in the army

of the United States, was a tax for a corporate purpose; that the framers of the Constitution intended to leave a large discretion to the legislature as to what should be considered as falling within that phrase; that the phrase "corporate purposes" should not receive "so narrow a construction as to justify the courts in holding that a municipality should not tax itself, although authorized by act of the legislature, because it might be a *debatable* question whether the proposed tax would promote the corporate welfare or not;" that a tax for a corporate purpose is a "tax to be expended in a manner which shall promote the general prosperity and welfare of the community which levies it; that every individual tax-payer shall have a direct interest in the object for which the tax is levied, or be directly benefited by the expenditure, is unattainable in the very nature of things. General results are all that can be expected; and if it appears that a tax has been voted and levied with an honest purpose to promote the general well-being of the municipality, and was not designed merely for the benefit of individuals or a class, its collection should not be stayed by the courts."

In *Taylor* v. *Thompson* (*supra*) the court, by way of illustrating the doctrine there laid down, said: "The creation of a police force, *the establishment of a reform school for juvenile offenders*, or a hospital for persons ill with contagious disease, would not directly benefit a non-resident taxed for their support; and yet no person would deny that these are proper ends of municipal taxation, and justly included in the phrase 'corporate purposes.'"

This analysis of the decisions of the Supreme Court of Illinois sufficiently indicates what was, at the time these bonds were issued, the established authoritative exposition of the phrase "corporate purposes." It is to be observed that when these bonds, by the joint action of the county and State authorities, were transmitted to the State of Pennsylvania for sale to its citizens, there was in the published decisions of the State court the broad declaration that "the establishment of a reform school for juvenile offenders" was beyond question a proper object of municipal taxation, and was a corporate purpose within the meaning of the constitution.

It is necessary that we should now trace the course of decisions subsequently rendered by that court.

In *Chicago, Danville, & Vincennes Railroad Co.* v. *Smith*, already cited, it was ruled that a township *donation*, made under legislative authority, and with the sanction of a popular vote, was a corporate purpose for which a tax could be assessed by the proper authorities of such township. The court there said: "It is contended that the appropriation was not for a corporate purpose. If it was for a *public* purpose — for the benefit of the inhabitants of the municipality — *then it would be for a corporate purpose.* The latter cannot be distinguished from the former; and all that we have said in relation to the public purpose of the tax will apply with equal force to a corporate purpose. . . . In *Taylor* v. *Thompson* (42 Ill. 9) this court defined a corporate purpose to mean 'a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it.' We accept this definition," &c. 74 Ill. 277; *Town of Middleport* v. *Ætna Life Insurance Co.*, 82 id. 562; *Lippincott* v. *Town of Pana*, decided October, 1879.

We come now to a case which, with entire respect for the very able and enlightened tribunal by which it was determined, we are constrained to say does not seem to be in line with its previous decisions, or with subsequent decisions to which we shall presently refer. We allude to *Livingston County* v. *Weide* (64 Ill. 427), decided more than three years after the bonds and coupons in suit were issued under legislative authority, and their proceeds received and used by the State. That was a suit in chancery, commenced in the State court by the board of supervisors of Livingston County against the county treasurer, to enjoin the latter from paying out money which had been collected to meet the interest upon the identical bonds whose validity is here questioned. None of the holders of the bonds were made parties to the suit. No attempt was made to bring them before the court in any form. It is not, therefore binding upon them as a final adjudication of the questions now before us. *Brooklyn* v. *Insurance Company*, 99 U. S. 362; *Pennoyer* v. *Neff*, 95 id. 714; *Empire* v. *Darlington*, *supra*, p. 87.

It was held in *Livingston County* v. *Weide* not to be a corporate purpose, in the constitutional sense, to provide a location for a State institution. After stating it to be the duty of the legislature to determine for the whole people the necessity for a State reform school, and that it was degrading to the State, and reflected no honor upon it to accept a donation from a particular locality to secure the location of a State institution, the court proceeds: "What peculiar interest have the tax-payers of Livingston County, or non-residents owning property therein, in such an institution being located in their midst? What corporate purpose does it specially promote by such location? What is a reform school? It is a penitentiary on a small scale, as is evident from the statute cited. How can it be a corporate purpose to establish what all admit is a necessary evil, a State reform school, in any town? It is a State, not a corporate purpose."

Upon these grounds the bonds issued by the county were held to be null and void, by whomsoever owned. It is to be observed that the court, in that case, refers, but without disapproval, to the definition of corporate purposes as given in *Taylor* v. *Thompson*, and, recognizing the inherent difficulty of laying down any precise rule applicable to every case, says: "The true doctrine is, such purposes, and such only [are corporate purposes] as are germane to the objects of the creation of the municipality, at least such as have a legitimate connection with those objects, and a manifest relation thereto."

The binding authority of that case is disputed by defendant in error upon the ground that his rights accrued long prior to its decision, and under a settled construction of the State constitution favorable to the validity of the acts of 1867 and 1869. He further contends that the rule announced in *Livingston County* v. *Weide* was substantially abrogated, if not entirely overthrown by subsequent decisions of the same court, particularly those in *Burr* v. *City of Carbondale* (76 Ill. 455) and *Hensley Township* v. *The People*, 84 id. 544.

In *Burr* v. *City of Carbondale* the question presented was whether a tax, levied by a city under legislative authority, to pay interest on city bonds, issued to *secure* the *location*, within its limits, of a *State* institution, called the Southern Normal Uni-

versity was or not a corporate purpose within the meaning of the Constitution of 1848. The court held that it was. And if we do not misapprehend altogether the grounds upon which the decision rests, they were: 1. That the university was, in the judgment of the court, an actual benefit to the community in which it was located. 2. That the bonds were issued after a vote of the people who were to be taxed for their payment. That case was distinguished from *Livingston County* v. *Weide* in these respects: that a State reform school was, in the judgment of the court, an undoubted injury, not an advantage, to the community in which it was located, and, therefore, to aid it by municipal taxation was not a corporate purpose; and, further, that the bonds, in that case, were issued without a vote of the people.

As to the objection that the bonds, under the State Reform School act, were issued without taking the sense of the people, it is sufficient to say that the board of supervisors were the corporate authorities of the county, and that the Supreme Court of Illinois had decided, under the constitution of 1848, as early as *Town of Keithsburg* v. *Frick* (34 Ill. 405), and again in *Marshall* v. *Silliman* (61 id. 218), and, finally, in 1870, in *Quincy, Missouri, and Pacific Railroad Co.* v. *Morris* (84 id. 411), that it was "by no means a necessary element in these [municipal] subscriptions that there should be a vote of the inhabitants of a town or city authorizing them. It is competent for the legislature to bestow the power directly" upon those who, in legal contemplation, were the corporate authorities of the municipality. *Roberts* v. *Bolles*, *supra*, 119.

In *Hensley Township* v. *The People*, *supra*, it was held, upon the authority of *Burr* v. *City of Carbondale*, that a county tax levied in payment of bonds issued, under legislative authority, to *secure* the *location*, within that county, of a *State* Industrial university, was a tax for a corporate purpose.

Upon this review of the decisions of the Supreme Court of Illinois our conclusion is that, testing the validity of these bonds by the decisions of that tribunal, rendered prior to and unmodified at the date of their issue, we would be obliged to hold they were issued for a corporate purpose. And, while the doctrines announced in *Livingston County* v. *Weide*, if

applied here, would establish their invalidity, the principles enunciated in previous cases, and in the subsequent cases of *Burr* v. *City of Carbondale* and *Hensley Township* v. *The People* seem quite as clearly to sustain their validity. If, as adjudged by the Supreme Court of Illinois, it was, within the true meaning of the Constitution of 1848, a corporate purpose to impose taxes to pay bounties to those who enlisted or were drafted in the army of the United States, or to secure the location of a State Normal or State Industrial University, or to pay municipal bonds issued, by way of donation, to aid in the construction of a railroad — if taxation, in the constitutional sense, was for a corporate purpose whenever imposed for a public purpose — we do not perceive upon what just ground it can be held not to be a corporate purpose for a municipality to make, under express legislative authority, a donation to secure the location within its limits of a State reform school, wherein juvenile offenders and vagrants may receive such care, discipline, education, and employment as, while effecting or contributing to their reformation, will protect the community in which they live from the evils and dangers which confessedly result from idleness and vagrancy among the young.

Had the acts under which these bonds were issued provided for the establishment of a reform school in Livingston County, for the discipline, education, employment, and reformation of juvenile offenders and vagrants within its limits, it would not be claimed, in view of the course of decisions in the State court, that the legislature has transcended its constitutional power. That the school established was a State institution, to be maintained after being established at the expense of the State, but in the benefits of which the county where it was located could participate, does not, it seems to us, affect the question of legislative power. It is a matter rather of public policy or expediency, the determination of which, the power existing, belongs to the legislative department. It was well said by the Supreme Court of Illinois, that "in the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a com-

prehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the legislature." 62 Ill. 273. In a previous case the court had said that "a proper respect for the legislative department requires us to regard its acts as *prima facie* constitutional." 42 Ill. 14.

We express no opinion as to what, in our judgment, is the true exposition of those parts of the Illinois Constitution to which reference has been made, or as to the wisdom or propriety of such legislation as that under examination.

Our purpose has been to ascertain what was the law of the State as expounded by its highest judicial tribunal. And while, perhaps, the judgment of the Circuit Court might, in view of our own decisions, be sustained upon other grounds, it is sufficient for the disposition of this case to say, that the adjudications of the State court do not show any such settled or uniform construction of the State Constitution upon the questions here involved as would justify us, with proper respect to the legislative department of Illinois, in holding that it had transgressed her fundamental law.

Judgment affirmed.

MOHR *v.* MANIERRE.

The statute of Wisconsin which provides for the sale of the real estate of a lunatic to pay his debts when his personal property is insufficient therefor, enacts that the order of the county court to show cause why the application of the guardian for a license to sell such real estate shall not be granted "shall be published at least four successive weeks in such newspaper as the court shall order, and a copy thereof shall be served personally on all persons interested in the estate and residing in the county in which such application is made, at least fourteen days before the day therein appointed for showing cause: *provided however,* if all persons interested in the estate shall signify in writing their assent to such . . . sale the notice may be dispensed with." It also enacts that the court "upon proof of the due service or publication of a

copy of the order, or upon filing the consent in writing to such sale, of all persons interested, shall proceed to the hearing of such petition, and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who shall think proper to oppose the application." A. was duly declared to be a lunatic and his lands in that State were on the petition of his guardian sold by order of the proper court. The sale was reported to the court and confirmed, and a deed made to the purchaser, against whom after the proceedings in lunacy were suspended, A. brought ejectment. He insisted that the court had no jurisdiction to make the order granting license to the guardian to sell, inasmuch as notice of the time and place of hearing the petition had not been published for the full period of four successive weeks. *Held*, 1. That the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. 2. That so far as the rights of the lunatic are concerned the jurisdiction of the court attached upon filing of the guardian's petition setting forth the facts required by the statute. 3. That as against the lunatic a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing. 4. The rulings in *Grignon's Lessee* v. *Astor* (2 How. 319), and *Comstock* v. *Crawford* (3 Wall. 396), cited on this latter point.

ERROR to the Circuit Court of the United States, for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. F. W. Cotzhausen and *Mr. James G. Jenkins* for the plaintiffs in error.

Mr. S. U. Pinney, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action for the possession of certain land in the county of Walworth, in the State of Wisconsin. It was commenced in one of the State courts, and on the application of the plaintiff was removed to the Circuit Court of the United States. It was there tried by the court, without the intervention of a jury, upon stipulation of the parties. The court was held by the circuit and district judges, and, as they were opposed in opinion, the case is brought here upon a certificate of the points upon which they differed.

The facts out of which this division arose are briefly these: The plaintiff Mohr, previously to the sale under which the defendant claims, was the owner of the premises in controversy. In 1869, he was, by legal proceedings in the county court of Walworth, adjudged to be a lunatic incapable of taking care of

himself and managing his property, and a guardian was appointed over him. In October, 1870, the guardian applied, by petition to the court, for license to sell the real estate of his ward for the purpose of paying his debts. The petition alleged that the goods, chattels, rights, and credits of the lunatic in the hands of the guardian were insufficient to pay such debts and the charges of managing his estate. It set forth the amount of the debts and charges, the extent to which they exceeded the personal estate of the lunatic, and his opinion as to the necessity of using the whole or the greater part of the estate to pay the indebtedness, accompanied by a certificate of the supervisors of the town to the same effect; and it gave a description of the real property. Upon being filed, an order was made by the court requiring the next of kin of the lunatic, and all persons interested in his estate, to appear before the court on a day named, and show cause why a license should not be granted for the sale of the estate as prayed; and that notice be given by publication in a newspaper for four successive weeks prior to the day of hearing, and also by service upon certain persons named.

On the day appointed, Jan. 2d, 1871, there being no appearance adverse to the application, and no objection interposed, the court made an order granting a license to the guardian to sell the lands. The order recited that pursuant to the order made on the 21st of November, 1870, the petition was heard and considered; that the affidavits of two persons, who were named, were filed, showing that the notice required had been duly published; that it appeared after full examination, that it was necessary, in order to pay the debts of the lunatic, that all his real estate should be sold; and that the supervisors of the town had certified to the judge of the court their approbation of the proposed sale, and that they deemed it necessary. The order required the guardian, before the sale, to execute to the judge a bond in the sum of $15,000, conditioned that he would sell the property, and account for and dispose of the proceeds in the manner provided by law; also that he would take the oath required by statute; give notice of the terms and place of the sale, with a proper description of the property, by posting in three public places in the town where the property was

situated, and by publication for three weeks in a weekly newspaper. It contained other directions not material to be mentioned, which were designed to secure a fair sale and a just price for the property; and it required the guardian to report his proceedings to the court. Under this license a sale was made, and a deed executed to the purchaser, and a report thereof made to the court, which was confirmed. The defendant claims under the purchase at this sale.

Subsequently the proceedings and commission in lunacy were superseded, and the plaintiff Mohr brought the present action to recover possession of the premises. After it was commenced a party to whom he had transferred an undivided interest was joined with him as co-plaintiff.

The case turns upon the validity of the sale in question. The order of the county court of Wisconsin, in granting the guardian license to sell the property, was assailed as having been made before notice of the time and place of hearing the petition of the guardian had been published for four successive weeks, as required by the court and the statute of the State. It is insisted that such notice was in the nature of process to bring the parties before the court, and its constructive service by publication for the period mentioned was essential to give the court jurisdiction. The order recited, as already stated, that by the affidavit of two persons named, the required publication was shown to have been made; but the judges certify that it appeared from one of the affidavits that the notice was not thus published. It is to be regretted that the two affidavits are not embodied in the record. We might differ from the judges in the conclusion reached by them. We might, perhaps, find that a publication was made once a week in four successive weeks, and hold that this was a sufficient compliance with the statute. Between the 21st of November, 1870, when the order for publication was made, and the 2d of January, 1871, when the petition was heard, more than four weeks had elapsed.

We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court

invalid *as against the plaintiff Mohr*,* the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell. The Supreme Court of the State, in a case brought by this plaintiff, — *Mohr* v. *Tulip*, — which came before it in 1876, affecting a part of the premises sold at the same guardian's sale, upon substantially the same proofs here presented, held that the sale was invalid for want of sufficient publication of such notice. On the other hand, the Supreme Court of the United States, in considering the validity of a sale of a decedent's estate under a statute in force in what was then the Territory of Wisconsin, requiring the county court, before passing upon the application for a license to sell, to order notice of its hearing to be given to all parties interested who did not signify their assent to the sale, had held, as far back as 1844, after deliberate consideration, that the absence of such notice from the record, or the fact that no such notice was given, did not affect the jurisdiction of the court, but was merely a matter of error, to be corrected by an appellate tribunal; and this decision has been repeatedly recognized as correctly marking the distinction between matters of error and matters of jurisdiction in proceedings for the sale of such estates. *Grignon's Lessee* v. *Astor*, 2 How. 319.

Under these circumstances the circuit and the district judge differed in opinion upon the following questions: —

1st, Whether the county court had jurisdiction to make the order granting the license to sell; or whether the order was invalid by reason of the alleged defect in the publication of notice; and —

2d, Whether, in view of the decision of the Supreme Court of the United States and the decision of the State Supreme Court in *Mohr* v. *Tulip*, the circuit court should follow the latter decision and hold the sale invalid.

The framers of the Constitution, in establishing the Federal judiciary, assumed that it would be governed in the administration of justice by those settled principles then in force in the several States, and prevailing in the jurisprudence of the country from which our institutions were principally derived. Among

* The record says as against the defendant, which is the same thing, for no one disputes his title but the plaintiff.

them none were more important than those determining the manner in which the jurisdiction of the courts could be acquired. This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required. If it was called into exercise with reference to real property by proceedings *in rem*, or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected. The rules governing this matter in these and other cases were a part of the general law of the land, established in our jurisprudence for the protection of rights of persons and property against oppression and spoliation. And when the courts of the United States were invested with jurisdiction over controversies between citizens of different States, it was expected that these rules would be applied for the security and protection of the non-resident citizen. The constitutional provision owed its existence to the impression that State prejudices and attachments might sometimes affect injuriously the regular administration of justice in the State courts. And the law of Congress which was passed to give effect to the provision, made it optional with the non-resident citizen to require a suit against him, when commenced in a State court, to be transferred to a Federal court. This power of removal would be of little value, and the constitutional provision would be practically defeated, if the ordinary rules established by the general law for acquiring jurisdiction in such cases could be thwarted by State legislation or the decision of the local courts. In some instances the States have provided for personal judgments against non-residents without personal citation, upon a mere constructive service of process by publication; but the Federal courts have not hesitated to hold such judgments invalid. *Pennoyer* v. *Neff*, 96 U. S. 744. So, on the other hand, if the local courts should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of non-resident citizens acquired when a different ruling prevailed, the Federal courts would be delinquent in duty if they followed the later decision.

If these views be applied to the present case there will be little difficulty in answering the questions which appear to have embarrassed the judges below. The statute of Wisconsin provides for the sale of the real estate of a lunatic to pay his debts when his personal property is insufficient for that purpose, and points out the steps which his guardian must take to obtain a license to make the sale. It is admitted that these steps were taken for the sale in question, except that the order of the county court to show cause why the license to sell should not be granted, issued upon filing the petition, was not published for four successive weeks before the petition was heard and the license granted. The statute on this subject says, in its fourth section, that "every such order to show cause shall be published at least four successive weeks in such newspaper as the court shall order, and a copy thereof shall be served personally on all persons interested in the estate and residing in the county in which such application is made, at least fourteen days before the day therein appointed for showing cause; *provided however, if all persons interested in the estate shall signify in writing their assent to such* ——— *sale* the notice may be dispensed with." And the sixth section provides that "the judge of the county court, at the time and place appointed in said order, or at such other time as the hearing shall be adjourned to, *upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale, of all persons interested,* shall proceed to the hearing of such petition, and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who shall think proper to oppose the application."

It is apparent from these sections that the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. It may be dispensed with if the parties having such interests consent to the sale. The consent could not be signed by the lunatic, for he, by his condition, would be incapable of giving a consent, and yet upon the others' consent, the court could proceed to act without notice to him.

Nor, indeed, was there any reason why publication of notice should be made for other parties than those who held adversary interests. The lunatic could not be affected by such publication any more than by his consent. The application of the guardian to the county court was required by the law only as a check against any improvident action by him. There was nothing in the nature of the proceedings which required a notice of any kind, so far as the rights of the lunatic were concerned. The law would have been free from objection had it simply authorized, upon the consent of the court, a sale of the lunatic's property for the payment of his debts. The authority of the court in that case, as in this, would have existed to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose.

There is no charge of fraud in the action of the guardian, nor is it suggested that the property sold did not bring a fair price. The simple question is whether, as against the lunatic, the license to sell was invalid for insufficient publication of notice of the hearing, the same being, as already stated, required only for the protection of other parties interested in the estate. The decision of this court in *Grignon's Lessee* v. *Astor*, to which we have already referred, would seem to be decisive on this point. Indeed, it goes beyond what is required for the affirmance of the judgment here. That was a case of an administrator's sale under a statute in force in the Territory of Wisconsin, which provided that the county court, previous to passing upon the presentation made by the petition of an executor, administrator, or guardian for license to sell the property in his hands belonging to the deceased or his ward, should order due notice to be given to all parties concerned or their guardians, who did not signify their assent to the sale, to show cause at such time and place as should be appointed why the license should not be granted. But in the order granting the license, it did not appear that notice had been given as thus required, and various other omissions were mentioned as impairing its validity. This court, however, held that no other requisites to the jurisdiction of the county court were prescribed by the statute than the death of the intestate, the insufficiency

of his personal estate to pay his debts, and a representation of these facts to the county court where he dwelt or his real estate was situated; that the decision of the county court upon the facts was the exercise of the jurisdiction which the representation conferred; that any irregularities or errors in the decision were matters to be corrected by an appellate court; and that the decision could not be collaterally attacked by reason of them. The court observed, in substance, that it was not necessary that the record should disclose the contents of all the papers before the county court, or its action in preliminary matters; that it was sufficient to call its powers into exercise that the petition stated the facts upon the existence of which the law authorized the sale; that the granting of the license was an adjudication that such facts existed; and that a purchaser was not bound to look beyond the decree. The doctrine thus stated has ever since been adhered to by this court in like cases, and in 1865, in *Comstock* v. *Crawford*, which arose upon a similar statute in the same Territory, that decision was followed. 3 Wall. 396. Its maintenance was held to be essential to the security of numerous estates in Wisconsin, where it is said many defects are found in the records of the proceedings of the probate courts in the early period of her history. It was adopted for many years by her courts after she ceased to be a territory and became a State of the Union. It was well fitted for the repose of titles. Whether the reasoning of this court in other cases would not lead to some modification of its doctrine it is unnecessary to consider. As already intimated, there is no occasion to go to the full extent of the doctrine for the disposition of the present case. Here no parties claiming interests adverse to those of the lunatic are objecting to the license to sell, granted on his behalf and at his request through his guardian.

In *Mohr* v. *Tulip*, the Supreme Court of Wisconsin overlooked the distinction between the position of the lunatic, who was in fact the applicant through his representative, and that of parties having adversary interests in the property. He can no more object to the sale of his property for want of notice to them, if the provisions of law intended for his protection were followed, than a plaintiff in a personal action could object to a

sale upon his own judgment on the ground that the latter was prematurely entered. The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor.

The statute declared that upon the existence of certain facts the sale of the lunatic's estate might be made, and when these appeared in the petition of the guardian, the court had jurisdiction to act, so far as his rights were concerned, as fully so as if the statute had so declared in terms, whatever may be the effect of its proceedings upon the interests of parties not properly brought before the court. We see no reason, therefore, so far as his interests are affected, to depart from the doctrine of *Grignon's Lessee* v. *Astor*.

Judgment affirmed.

GUNTON v. CARROLL.

A. and B. in November, 1846, entered into an agreement under seal, providing for the settlement of long standing and disputed accounts. A balance from B. to A. was ascertained and the mode of payment and security agreed upon. A. released property of B. from the lien of judgments. B. among other things stipulated that he would obtain partition of certain lands wherein he had an undivided interest, and convey in fee the part assigned to him in severalty to A. at such price as should be adjudged by three appraisers, one to be appointed by A., one by B. and one by the other two. Such price to be credited on the judgments held by A. against B. and that the latter would give good security for the balance remaining due. B. died in 1849. There was no partition until 1866, when it was effected by his devisees, a fact not known to A. until 1872. They have made to A. no conveyance of the part of said lands assigned to them in severalty. A. filed his bill in 1876, alleging that he had performed all the stipulations on his part to be performed, and that $40,000 of the original debt with accruing interest remains unpaid, and praying for such a conveyance, for the ascertainment of the balance under the order of the court and for general relief. The devisees demurred. *Held*, 1. That upon the case made by the bill, A's remedy was not barred by the lapse of time. 2. That A. having under the agreement parted with rights, and B. received value, the consideration of which was in part the stipulation concerning the lands, the agreement for the conveyance can be specifically enforced and the court will, if it be necessary, provide a mode for ascertaining the value of the lands.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. John D. McPherson for the appellants.

Mr. George F. Appleby for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellants in their character of trustees of the Bank of Washington brought this suit against the executors and devisees of Daniel Carroll. The charter of that bank expired a great many years ago, and the trustees who conduct its affairs are acting under a statute of Congress. At the time of the expiration of the charter there was a large indebtedness on his part to the institution, a portion of which was secured.

There were several judgments against him in favor of the bank, and he had a suit in chancery for the adjustment of disputed matters in regard to that indebtedness.

On the 3d day of November, 1846, an agreement under seal was entered into between him and the trustees by which all their disputes were settled. The sum due by him to the bank was ascertained, and the mode of payment and security agreed upon.

This agreement is the foundation of the present suit. Among other things completed at the time was the payment of part of his debt, the release of certain real estate from the lien of the complainants' judgments, and his transfer of judgments held by him against other persons to the trustees, with an understanding that all moneys thereafter collected on them should be credited on the judgment of the bank against him. Certain property known as the Sligo estate, in which he had an undivided interest, was by him to be conveyed to the bank as soon as he could procure a partition with the other part-owners. He also covenanted that, after all this was done, he would give good security for any balance due by him to the bank. As the agreement with regard to the Sligo property is the matter of principal importance in this suit we give that part of it *verbatim:* "The said Daniel Carroll shall forthwith cause, at his expense, the property known as the Sligo estate, of which he is the owner of an undivided share, to be legally or equitably divided between him and the other owner or owners thereof, and

shall immediately thereafter, by a valid deed, convey the share or portion of said property which may be allotted to him unto the trustees of the said bank, or as they may direct, in fee simple, at such price as three competent freeholders — to be selected, one by the said Daniel Carroll, another by the trustees of said bank, and the third by the other two appraisers — shall estimate and adjudge the same to be worth, as if sold on a credit of three equal payments at one, two, and three years, with interest thereon payable semi-annually; and the price, on the due execution of said conveyance to the trustees of said bank, or as they may direct, shall be credited against the said judgments, so as aforesaid held by the bank against said Daniel Carroll."

Much of the agreement was performed on both sides. Money was paid and property released. The bill avers that all which the trustees agreed to do, or could do, was done, and that there is, including interest, over $40,000 of the original debt unpaid, and that no security has been given. In reference to the Sligo property it is alleged that no partition was made by Carroll in his lifetime — he died in May, 1849 — but that his devisees effected such partition in 1866, and have since sold some part of the property allotted to them in that partition and received the purchase-money. It also alleges that the trustees were not aware that any such partition had been made until 1872, this suit having been commenced in 1876. They also set up an attempt, in 1875, to bring these matters before the court in the original chancery suit, pending when the agreement was made, by an amended bill and revivor, which was overruled.

The defendants filed a general demurrer, setting up twenty grounds of demurrer. It was sustained by the court below and the bill dismissed.

The demurrer must be overruled, if there be any part of the bill which entitles the complainants to relief.

The main ground of the demurrer — the lapse of time since the cause of action accrued — is relied on in reference both to the Statute of Limitations and the general doctrine of laches. If the judgments against Carroll have never been revived by *scire facias* or otherwise, the debt which they represented is

barred by limitation, and its collection cannot be enforced by any proceeding at law. The bill is silent on that subject. It may admit of doubt whether in the mere absence of any such allegation the court will raise the presumption of payment on which the equitable defence is founded. Without deciding this, we think there is another ground on which defendants must be put to their answer, and in that answer they can plead or rely on the statute, or the lapse of time coupled with an averment that the judgments are no longer alive.

That matter concerns the Sligo property. No bill for specific performance could have been brought against Carroll or his devisees before the partition required by the agreement was made. The delay in making it was that of Carroll and of his devisees. For this the complainants were in no manner chargeable with laches and should receive no detriment. Frye on Specific Performance, sect. 740; *Ridgway* v. *Wharton*, 6 H. of L. Cas. 237.

The partition was made in 1866, and the knowledge of it did not come to the complainants until 1872. If they had known it as soon as it occurred, six years, under all the circumstances, would not be considered as an unreasonable delay on their part, in view of the fact that the defendants had taken twenty years to perform one part of the contract, namely, to make partition.

In 1872, as soon as they learned that the partition had been made, the trustees attempted to assert their rights by an effort to revive the old chancery proceeding out of which the agreement arose. Being defeated in this, they commenced the present suit in March, 1876. We think that on the face of the bill they are not barred by lapse of time. If there are other matters not shown in the bill which would make that a bar, no injury can accrue by requiring them to be shown by way of answer or plea.

It is said, however, in regard to the Sligo property, that the original contract is one of which a court of equity cannot enforce specific performance, because the price to be paid for it is not definitely fixed, and a court of equity cannot enforce the agreement to submit the question of price to the award of arbitrators.

It cannot be successfully disputed that in the general terms thus stated this is the established equity doctrine. It would be applicable if this was a case in which the complainants had agreed to buy and the defendants to sell, the conveyance of the property, and the actual payment of the price resting in covenants yet to be performed, the latter being the sole consideration of the former.

It is, however, quite otherwise in the matter before us. This particular clause was only one of many which adjusted long-standing and complicated transactions and compromised a vexatious litigation. Moneys were paid, liens released, sureties discharged, and suits settled by this agreement. Under it the complainants parted with rights and Carroll received value, the consideration of which was, at least in part, this stipulation about the Sligo estate.

The contract differs in another particular from the cases cited to show that it cannot be enforced. The doctrine there rests upon the ground that the court must be enabled to enforce the payment of the price simultaneously with compelling the conveyance, and it cannot do this by enforcing an arbitration. But in the case before us the price was already paid. The money was in Carroll's hands. The only thing to be done was to determine how much of his debt to the bank was to be satisfied by the conveyance. The case is, therefore, one in which the land was sold to the bank and the purchase-money left in the hands of the vendor. By the terms of the agreement, Carroll was to convey immediately after partition, and then the price was to be ascertained. If he had conveyed, as it was his duty to do, or if his heirs had conveyed as soon as they had made partition, the conveyance would not be rescinded because they could not agree upon the price or upon arbitrators. With the title in the complainants and the money in possession of defendants, a court would find a way to ascertain the credit to be allowed on Carroll's debt to the bank.

Another view is the probability that Carroll's debt as to every thing else is barred, and that the debt is three or four times the value of this property. So that its valuation is a mere form, immaterial to either party.

In view of a court of equity, a contract for the sale of land is

treated, says Mr. Justice Story, for most purposes, precisely as if it had been specifically performed. The vendee is treated as the owner of the land and the vendor as the owner of the money. The vendor is deemed in equity to stand seised of the land for the benefit of the purchaser, and the trust attaches to the land so as to bind the heir of the vendor. 1 Story Eq. Jur. sect. 790, and the cases there cited. Of course the Equity here stated is stronger when the purchase-money is actually in the hands of the vendor.

Nor is the principle inflexible that the court will not specifically enforce the contract where the price is not fixed or is left to be fixed by arbitration.

Cheslyn v. *Dalby* (2 Y. & C. 170) is very much like the present case. Cheslyn being indebted to Thomas Dalby in a large unliquidated sum, gave a deed of trust for money borrowed at the time from another party, with a stipulation that it should also stand as a security for the unliquidated debt of Dalby to be afterwards ascertained by arbitration. Cheslyn having paid the principal sum secured by that deed, brought suit for a reconveyance, and Dalby filed a cross-bill to have his debt paid out of the property before this was done. The objection was raised that this was in the nature of a specific execution of the deed, which the court would not decree, as the amount was uncertain, and could not be ascertained in the stipulated mode, as no award had been made and the umpire was dead. But the objection was overruled.

Alderson, B., says: "This agreement is composed of two distinct parts: 1. It is admitted there is some balance due to Thomas Dalby, and it is agreed that the estate is to be subject to a lien for that balance. But, 2dly, there is also an agreement as to a specific mode of ascertaining that balance in case of dispute. Now, the latter has failed by events over which the parties had no control. But it seems to me that, notwithstanding this, the former part remains entire, and if Mr. Cheslyn has admitted that there is a balance due, and has by a deed, executed under such circumstances as that it ought to be enforced, agreed that his estate should be subject to a lien for that balance, why am I to decree a reconveyance of the estate without compelling him to fulfil that part of the agreement?"

It was accordingly referred to a master to state an account in which this unascertained balance of Dalby's debt should be included.

In the present case, Carroll made his agreement, in which a balance ascertained was admitted to be due; the land was to stand in part payment of this balance. He died before arbitrators could be appointed to fix the sum at which the estate should be taken. The demurrer admits all this.

Dinham v. *Bradford* (Law Rep. 5 Ch. 519) is another case in which where one partner was in a certain event to take the partnership assets at a valuation to be ascertained precisely as in the case before us, Lord Hatherley said: "Here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed on account of the difficulty which has arisen. . . . If the valuation cannot be made *modo et formâ* the court will substitute itself for the arbitrators."

So of the case before us. Carroll has all the benefit of the agreement, in releasing property from liens, in paying his debt by his claims on others, and in a long indulgence, and now, because he has died without appointing arbitrators, his heirs say this part of the agreement must fail.

We think on the whole the demurrer should be overruled, and defendants put to their answer, and for this purpose the decree of the court below will be reversed, and the case remanded to it for further proceedings, and it is

So ordered.

SOUTH CAROLINA v. GAILLARD.

1. The act of the General Assembly of South Carolina, passed June 9, 1877, entitled "An Act to provide the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the State and the tax-payer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank.
2. After that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

ERROR to the Supreme Court of the State of South Carolina.

The facts of this case are as follows: —

In December, 1812, the State of South Carolina established a bank in the name and for the benefit of the State, and pledged the faith of the State to supply any deficiency in the funds specially set apart as its capital, and to make good any losses arising from such deficiency. The bank was authorized to issue notes and bills for circulation, and by sect. 16 it was provided "that the bills or notes of the said corporation originally made payable, or which have become payable on demand in gold and silver coin, shall be receivable at the treasury of this State, either at Charleston or Columbia, and by all tax collectors, and other public officers in payment of taxes and other moneys due the State." The original charter was extended from time to time, and the bank continued in successful operation until the late civil war. At the close of the war it stopped business, and in 1868 the charter was repealed and provision made for winding up its affairs. Under the operation of this law a large amount of the circulating notes was surrendered to the State and bonds of the State taken in exchange therefor. The time for presenting bills to be exchanged expired Jan. 1, 1869, and only such bills as were issued prior to Dec. 20, 1860, the date of the adoption of the ordinance of secession by South Carolina, could be presented at all. A considerable amount of bills issued before the repeal of the charter are still outstanding.

When the charter was granted *mandamus* was an existing remedy in the State for compelling public officers to perform

their public duties, and in that way, under the practice which prevailed in the courts, tax collectors could have been required to receive the bills of the bank in payment of taxes.

On the 9th of June, 1877, the General Assembly of South Carolina passed an act entitled "An Act to provide the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto." Sect. 1 of that act is as follows: —

"*Be it enacted*, by the Senate and House of Representatives of the State of South Carolina, now met and sitting in general assembly, and by the authority of the same, that the treasurers of the several counties in the State shall not receive in payment of taxes of the State any bills of the corporation known as the President and Directors of the Bank of the State of South Carolina, which are not genuine and valid, or the payment of which is prohibited by the Constitution of the State and of the United States, or which have been funded by the State and since fraudulently uttered. And all bills of said corporation which shall be tendered in payment of any taxes, and shall not be received as payment, shall be enclosed in a package, sealed and signed by the party tendering the said bills, and by the treasurer to whom said tender is made; and said package shall be deposited by the treasurer with the clerk of the court of common pleas for the county, who shall give duplicate certificates of said deposit, one to the party tendering said bills, and the other to the treasurer, to abide the decision of the court in any proceedings which may be instituted in regard to said bills; and that in all proceedings by *mandamus* or otherwise to compel the reception of bills of the said corporation as a legal tender for taxes to the State and refused, an issue shall be framed under the direction of the judge, and at a regular term of the court of common pleas for the county wherein said bills are tendered shall be submitted to a jury to inquire and determine by their verdict if the bills so tendered in payment for taxes are genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered, and are bills the payment of which is not prohibited by the Constitution of the State and of the United States. And upon the trial of said issue the burden of proof shall be upon the person tendering said bills to establish that the said bills are the genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered, and that said bills are bills the payment of which is not prohibited

by the Constitution of the State and of the United States; and if the jury shall by their verdict establish that the bills so tendered are genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered, and are bills the payment of which is not prohibited by the Constitution of the State and of the United States, then the treasurer of the county shall receive such bills in payment of all taxes due the State. And if the jury shall by their verdict establish that the bills so tendered are not genuine or valid bills of the said corporation, or that they have been funded by the State and since fraudulently uttered, or that they are bills the payment of which is prohibited by the Constitution of the State and of the United States, it shall then be the duty of the clerk of the said court to cancel the said bills in the presence of the court, and to make a sealed package of the bills and file the same in his office with the record of the case."

During the fiscal year commencing Nov. 1, 1877, and while this act was in force, William L. Trenholm, as executor, tendered the treasurer of Charleston County certain bills of the bank in payment of taxes charged against him. This tender being refused, the bills were enclosed in a package, sealed and signed by Trenholm and the treasurer, and deposited with the clerk of the court of common pleas of the county, he giving duplicate receipts therefor, to abide the decision of the court in any proceeding that might be instituted in regard to them. All this was done before Nov. 1, 1878.

On the 24th of December, 1878, the general assembly of the State passed another act repealing that of 1877. This act in effect provided that in all cases in which any person against whom any taxes stood charged had theretofore tendered in payment the bills of the bank, he might within sixty days after the passage of the act pay the taxes without penalty under protest in such funds as the treasurer would receive. This being done, it was the duty of the treasurer to pay the money so collected into the State treasury, giving the comptroller-general notice that the payment had been made under protest, and the person making the payment might at any time within thirty days sue the county treasurer in the court of common pleas of the county to recover back the money. If on the trial it should be determined that the taxes were wrongfully or illegally

collected, for any reason going to the merits, it was made the duty of the court to certify of record that the same had been wrongfully collected and ought to be refunded, and of the comptrollor-general to issue his warrant for the refunding of the taxes, and this warrant was to be paid in preference to other claims on the treasury.

After this last act went into effect, the treasurer of the county advertised the property, on which the taxes of Trenholm were charged, to be sold on the 17th of March, 1869, for default in the payment. Thereupon Trenholm, on the 13th of March, filed a petition in the Court of Common Pleas of Charleston County, under the act of 1877, to have the requisite proof taken and the bills accepted in discharge of his taxes. In his petition he assumed all the burdens imposed by the act of 1877, and sought to avail himself of the remedy there given. The court of common pleas ruled that the prayer of the petition must be granted, and ordered the issues to be framed, but the Supreme Court of the State, on appeal, decided that the act of 1877 was repealed by that of 1878, and consequently the proceeding, commenced as it was after the repeal, could not be sustained. The order for framing the issues was thereupon set aside and the petition dismissed. To reverse that judgment the State, on the relation of Trenholm, sued out this writ of error.

Mr. Edward McCrady, jr., and *Mr. Ch. Richardson Miles*, for the plaintiff in error.

The court declined to hear counsel for the defendant in error.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

No question is raised in this case as to whether or not the act of 1877 impaired the obligation of the contract of the State, which is contained in the bills of the bank, or the charter. By accepting the act and bringing suit under it, Trenholm conceded its validity. He contends, however, that when he tendered his bills in payment of his taxes, and so far complied with the provisions of that act as to allow the bills to be deposited with the clerk of the court to abide the result of any proceeding that might be instituted in regard to them, the State entered into a

new contract with him, by which it agreed to accept his bills in payment of his taxes if he established their validity in the way provided. It is the obligation of this alleged new contract which he claims has been impaired by the act of 1878.

We cannot find from the record that this question was presented in this precise form to the Supreme Court of the State, but it was undoubtedly involved in the case, and must have been decided directly or indirectly. No other question has been argued here.

As we look upon the act of 1877, it does no more than provide a way of determining whether bills offered in payment of taxes are binding on the State. It provides a remedy in case a county treasurer shall wrongfully refuse to accept a bill that is offered him. It is, in fact, what its title says it is, "An Act to prescribe the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto." It makes no offer of a new contract to a tax-payer or bill-holder, but simply says to him, if your bills are any time refused when offered in payment of taxes, you may proceed in a certain way to compel their acceptance if they are genuine and valid. There is no new contract, but a new way of enforcing an old one.

By the act of 1878 the remedy thus given has been taken away, with no saving in favor of tenders already made, except to give those who have made such tenders the right to pay their taxes under protest, without penalty, in sixty days, and sue to recover back what they have thus paid. They have still all their old remedies unless they have been taken away by the act of 1878, which is not the question here. All we have to decide is, whether that act has taken away from Trenholm the remedy he had under the one of 1877.

The new remedy formed no part of the charter contract of the State. Passed, as the act was, long after the charter was granted, and long after all the outstanding bills of the bank were issued, the State was restrained by no contract obligation from taking away or changing the remedy it then gave. All the cases in this court, where the question has arisen, agree in holding that "the States may change the remedy, provided no substantial right secured by the contract is impaired." It is

enough if the contract is "left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guaranty of the Constitution gives it protection to that extent. *Walker* v. *Whitehead*, 16 Wall. 314; *Tennessee* v. *Sneed*, 96 U. S. 69.

We agree with the Supreme Court of the State that the "proceeding" contemplated by the act of 1877 was not "instituted" when the repeal took place. The tender and deposit of the bills laid the foundation for the authorized proceeding, but did not institute it. This is clear from the language. The bills are to be deposited "to abide the decision of the court in any proceeding which *may be* instituted," thus implying that when the deposit was made proceedings had not been instituted. These proceedings may be "by *mandamus* or otherwise to compel the reception of the bills." The taxes are not paid by the tender. If the acceptance of the tender can be enforced, then the payment will be complete, but not before. This tender was made when a special remedy for its enforcement was allowed. Before Trenholm availed himself of that remedy it was taken away, and he was remitted to such as he had before this act, or such as were substituted on the repeal, if that rightfully took away those which existed when the charter contract was made. But whether this be so or not is unimportant, because it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. *Railroad Company* v. *Grant*, 98 U. S. 398, and cases there cited. The simple question in this case is, whether this repeal was valid and constitutional as against Trenholm and his rights. We think it was.

Judgment affirmed.

WHEELER v. INSURANCE COMPANY.

1. Where by his covenant or otherwise a mortgagor is bound to insure the mortgaged premises for the better security of the mortgagees, the latter have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken out by him.
2. This equity exists, although the covenant provides that in case of the mortgagor's failure to procure the insurance and assign the policy, the mortgagees may procure it at his expense.
3. This equitable doctrine obtains in Louisiana.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. E. T. Merrick and *Mr. G. W. Race* for the appellants.

Mr. Thomas Hunton, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Johnson & Goodrich, commission merchants of New Orleans, being creditors of John H. Green, a planter, for advances made, suggested to him that he should authorize them to effect insurance on his buildings, gin-house, machinery and cotton in the gin-house, for their better security. He accordingly wrote them a letter authorizing them to effect such insurance; and they procured from The Factors and Traders' Insurance Company of New Orleans insurance on an open policy in their own names for $5,500 on the buildings and machinery, and $2,000 on the cotton. This was in November, 1872, and the insurance was for sixty days. In January, 1873, this insurance was renewed for sixty days longer; and before its expiration, in March, 1873, the buildings, machinery, and a small quantity of cotton were destroyed by fire. Johnson & Goodrich took measures to recover the insurance, and received $900 for the loss on the cotton, leaving a balance still due to Green of $3,450, for the payment of which, Green having become insolvent, they relied on the insurance upon the buildings and machinery, and presented to the insurance company the necessary proofs to collect the same.

At this point the appellants, Ezra Wheeler & Co., interposed, and set up a claim to have the insurance money on the

buildings and machinery paid to them, and for this purpose filed their bill against the insurance company, Green, and Johnson & Goodrich. The defendants severally answered, proofs were taken, and upon due hearing the court below made a decree dismissing the bill of complaint. From that decree the present appeal was taken.

The case as developed by the pleadings and the evidence appears to be substantially as follows: Prior to the employment of Johnson & Goodrich by Green as his commission merchants, he had employed the firm of Foster & Gwyn, of New Orleans, in the same capacity, and had become largely indebted to them. In 1870 he had given them his note for $10,000; in 1871 another note for $3,723.61; and in March, 1872, a third note for $3,009.55. To secure the payment of each of these notes, with interest at eight per cent per annum, he gave successive mortgages on his plantation, buildings, machinery, and stock, with an agreement in the last two mortgages to insure the buildings and machinery and to transfer the policies of insurance to the mortgagees for their better security, or, in default of doing this, that the mortgagees and all subsequent holders of the notes secured by those mortgages should have the right to effect such insurance at his expense. These mortgages were all given and recorded before Johnson & Goodrich procured the insurance now in question. Foster & Gwyn, in July, 1871, under the reserved right contained in the second mortgage, effected an insurance for one year upon the buildings and machinery, but did not renew the same. In the spring or summer of 1872, Foster & Gwyn being largely indebted to the appellants, transferred to them the three notes and mortgages of Green by way of collateral security, and the appellants rely on this security for making their claim against Foster & Gwyn.

Being thus the holders of the notes and mortgages of Green, the appellants claim the insurance money in question on two grounds: First, on the ground that although the insurance was effected in the name of Johnson & Goodrich, they acted merely as agents of Green, and the insurance was really taken out for his benefit; and he having agreed in and by the last two mortgages to insure the property for the benefit of the mortgagees

and to transfer the insurance to them, the appellants as holders of the notes and mortgages are equitably entitled to the insurance money. Secondly, on the ground, as the appellants allege, that when the insurance in question was about to be renewed in January, 1873, they were assured by Green and by Johnson & Goodrich that it was effected for the benefit of them, the mortgagees, or at least they were led to believe that this was so done.

An examination of the evidence in the case fails to convince us that the latter charge is true, at least so far as Johnson & Goodrich are concerned. Foster testifies that about the time of the renewal he, on behalf of the appellants called on Green at his plantation, and requested him to have the property insured, and that Green promised that he would write to Johnson & Goodrich to renew the insurance. The witness does not say, and Green in his answer denies, that he promised to have any insurance effected for the benefit of the mortgagees or the appellants; and the evidence is clear that Johnson & Goodrich had no such understanding. They regularly renewed their policy, and on the same day Gwyn called at their office and asked a clerk whether they had taken out a policy on the cotton-gin and buildings of Green, and the clerk answered that they had; and nothing more appears to have been said. Johnson & Goodrich both swear that they had no knowledge of the stipulation about insurance in the mortgages, or that Green was under any engagement to effect insurance, and that their only motive for effecting insurance on the property was to protect themselves. They charged the premiums to Green, it is true; but this they had a right to do under the circumstances, inasmuch as he authorized them to effect the insurance, and was entitled to any benefit to accrue therefrom after their claim against him was satisfied.

The appellants insist, however, that Johnson & Goodrich had no insurable interest in the buildings and machinery, and, therefore, that they have no lawful claim to any part of the insurance in question. But it does not lie in the mouths of the appellants to make this argument. If it has any force (which it is not necessary for us to decide), it can only be urged by the insurance company, and they do not urge it.

Since, therefore, there is no proof that Johnson & Goodrich

did not act with entire fairness in the whole transaction, and without notice of Green's covenant to insure; and since there was no privity between them and the appellants, we do not see how the latter can sustain any claim at law or in equity against them.

But as the debt due to Johnson & Goodrich will not exhaust the whole amount of the insurance, and as the balance rightfully belongs to Green, the question arises whether, as to that balance, the claim of the appellants is not maintainable. It is undoubtedly the general rule that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. *Carter* v. *Rockett*, 8 Paige (N. Y.), 436. But it is settled by many decisions in this country that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. *Thomas's Adm'rs* v. *Vankapff's Ex'rs*, 6 Gill & J. (Md.) 372; note to 3 Kent, Com. 376; Angell, Fire and Life Insurance, sect. 62; 2 Am. Lead. Cas. 834, 5th ed.; 1 Herman, Mortgages, sect. 424, and cases there cited. And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense. *Nichols* v. *Baxter & al.*, 5 R. I. 491. Of course the mortgagee's equity will be governed by the scope and object of the agreement; as, if the agreement be to insure for a certain amount, the equity will not apply beyond that amount; and as its object is to afford better security for the payment of the debt, it will not be enforced farther than is necessary for such security; if the debt is abundantly secured by the property which remains liable to the mortgage, a court of chancery would properly decline to enforce it. The present case, however, is not embarrassed by any questions of this sort. The appellants have proceeded to sell the immovable property mortgaged, which did not more than satisfy the first mortgage; and the amount of insurance money remaining after satisfying the claim of Johnson & Goodrich is less than the insurance stipulated for in the other mortgages.

The equitable doctrine upon which the appellants' claim is founded undoubtedly obtains in Louisiana. It is derived from the principles of the civil law, which is the basis of the civil code of that State; and it is supported by the authorities cited from the Louisiana reports. See Civil Code La., art. 1965; *Williams* v. *Winchester*, 7 Mart. N. S. (La.) 22; *Citizen's Bank* v. *Dugué and Louisiana State Bank*, 5 La. An. 12; *Braden* v. *Louisiana Insurance Co.*, 1 La. 220.

Our conclusion is, that the decree of the Circuit Court should be reversed, and the case remanded with instructions to enter a decree in conformity with this opinion; and it is

So ordered.

BROOKS v. RAILWAY COMPANY.

1. Where a contractor performs labor and furnishes materials upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company on its entire line of road to secure its bonds, — *Held*, that on filing his claim within the time, and in the mode prescribed by the statute, he has, as against the mortgagees, a paramount lien upon the entire road.
2. A sub-contractor, between whom and the contractor a settlement had been made and the balance ascertained, filed within the required time in the clerk's office of the proper court his claim in due form against the contractor and the company, and, in a suit whereto they were all parties, judgment establishing his lien on the road was rendered. In a foreclosure suit subsequently brought against the company and him, the mortgagees objected to the validity of his lien because he had not also presented to the company that settlement certified by the contractor to be just. *Held*, that the objection was not well taken.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. James Grant for the appellants.

Mr. N. M. Hubbard and *Mr. B. J. Hall*, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The appellants, who were complainants below, are trustees in a mortgage made by the Burlington and Southwestern Railway

Company on its road and other property to secure $1,800,000 of bonds put on the market and sold. They instituted this foreclosure suit against the company, and brought in, during its progress, other parties who were asserting mechanics' liens on the road. Of these parties only the interest of O'Hara Brothers and Wells, French, & Co., whose liens were by the court held to be paramount to that of complainants, remain to be considered in the appeal of the trustees from that decree.

The company was organized under the laws of Iowa to build a railroad from Burlington, on the Mississippi River, in a southwestern direction to some point on the Missouri River. From the initial point, at Burlington, to Viele, in Lee County, Iowa, they by contract used the track of a road already built between Burlington and Keokuk. From Viele to Bloomfield, in Davis County, they built and paid for their own track. From Bloomfield to Moulton, in Appanoose County, fourteen miles, they used the road of another company, already built, and from Moulton to Unionville, in Missouri, they built their own road. It is for the work and labor done and materials furnished on the latter piece of the road that the lien of the appellees was allowed by the court on the road and right of way, stations, &c., of the company from Viele Junction, in Lee County, to the South Iowa State line, in Appanoose County, in favor of O'Hara Brothers for $39,763.24, and in favor of Wells, French, & Co., for $8,528.83.

It is conceded that the work for which these liens were allowed was done for the company by the parties claiming them, and no question is raised here as to its value, or to the liability of the company to pay for it. The fact is undisputed that before any of it was done, or the contract therefor made, the mortgage to the complainants had been executed and duly recorded.

It was also undisputed that both the appellees, whose claim is now contested, were sub-contractors, and that the only contract which the railway company made for labor and materials was with another organization, known as the Mississippi and Missouri Construction Company.

This purely artificial being, composed of the officers and some

of the stockholders of the railway company, was organized for the purpose of building this road. It belongs to a class of corporations which have become well known of late years as instruments to enable the officers of railroad companies to make contracts with themselves to build the roads for their stockholders. In the present case, this construction company having sublet all the contract to one J. W. Barnes, very soon took itself out of the way, and by an agreement between it and the railway company, of which the following extract is found in the record, its existence ceases to be of any further significance in this contest: —

"*Contract between B. & S. W. Railway Company and the M. & M. Construction Company. Dated Feb.* 6, 1873.

"The railway company assumes all outstanding liabilities of the construction company, except officers' salaries. All previous contracts between the two companies are annulled.

"The railway company assumes the contract of J. W. Barnes for construction of portions of the main line and branch of the B. & S. W. Railway Company, and the payment of all estimates due and to become due thereon."

This leaves to be considered here the railway company, J. W. Barnes, the principal contractor for construction of the road, O'Hara Brothers, and Wells, French & Co., sub-contractors, and the complainants. It is also to be observed that before the present foreclosure suit was begun O'Hara Brothers and Wells, French & Co. had both commenced legal proceedings in the proper courts of the State, and had, after a contest with the railway company, obtained judgments establishing their liens. It was after this that they were made defendants to this suit.

To those proceedings, Barnes, the principal contractor, and the railway company were parties, and we take it for granted that as against them the judgments establish the validity of the liens. The judgments do not bind the appellants as they were not parties thereto. The validity of the liens as against them, and if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case.

By the law in force when these transactions took place a mechanic has, for labor done or things furnished, a lien on the *entire land* upon which the building, erection, or improvement was made, which has been held to include railroads, and it shall be preferred to all other liens and incumbrances which shall be attached to or upon such building, erection, or other improvement made subsequently to the commencement of said building, erection, or other improvement. Revision of 1860, sect. 1853; Code of 1873, sect. 2139.

This provision, it will be observed, relates to the *land* on which the improvement is made and gives the mechanic a paramount or preferred lien only as against other liens and incumbrances created *subsequently* to the beginning of his work. Those made *prior* to that time are unaffected by it. But sect. 1855 of the Revision, now sect. 2141 of the Code, makes a different provision in regard to his lien on the *building, erection, and improvement* for which the lien is claimed. It reads thus: —

"The lien for the things aforesaid on work shall attach to the *building*, erections, or improvements for which they were furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter."

The mechanic, therefore, has a lien upon the *land* paramount to all rights accruing after the commencement of his work, and upon what he puts upon the land paramount to all other claims, whether created before or after that time. The decisions of the courts of Iowa are to this effect and the proposition is not disputed in argument here.

Have the sub-contractors in this case taken the necessary steps to establish their lien?

What is required to initiate the lien as to all other persons but sub-contractors is to be found in sect. 1851 of the Revision of 1860.

"Sect. 1851. It shall be the duty of every person, except as has been provided for sub-contractors, who wishes to avail himself of the provisions of this chapter, to file with the clerk of the district court

of the county in which the building, erection, or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished, or work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits, and containing a correct description of the property to be charged with said lien and verified by affidavit."

This section was subsequently modified by the following statute: —

"*An act to amend sect.* 1851 *of Revision of* 1860, *relating to Mechanics' Liens.*

"Sect. 1. Be it enacted by the General Assembly of the State of Iowa, that the following words are hereby added to sect. 1851 of Revision of 1860, to wit: 'But the failure to file the claim, account, settlement, or demand, in the time named in this section and in sect. 1847, shall not operate to defeat the claim or demand, nor the lien of the person supplying the labor or material, as against the owner, nor the contractor, nor as against any one except purchasers or incumbrancers, without notice, whose rights accrued after the ninety days and before the account, or settlement, or claim, or lien is filed.'

"Approved April 7, 1862."

The statute, however, makes provision that a sub-contractor who shall do the work which his principal had contracted to do shall by proper proceeding secure to himself the lien which arises from the work done or materials furnished. In such case there is a more complex affair. There are here the owner of the property, the principal contractor, and the sub-contractor, who, as well as prior and subsequent incumbrancers or lien holders, have rights to be affected. It may generally be supposed that the principal contractor has sublet his contract so as to leave a profit to himself. He is entitled, therefore, to see that his sub-contractor does not take this profit. The owner is not bound for more than he agreed to pay the principal contractor. In view of these interests, sect. 1847 of the Revision, sect. 2131 of the Code of 1873, enacts that every sub-contractor wishing to avail himself of the benefit of the act, shall give notice to the owner of the land, before or at the time he furnishes any of the materials or performs any of the labor, of his inten-

tion to perform or furnish the same, and afterwards he shall settle with the contractor therefor, and having made the settlement in writing, the same, signed by the contractor and certified by him to be just, shall be presented to the owner. He is also required, within thirty days from the time the things shall have been furnished or the labor performed, to file with the clerk of the district court of the county in which the building is situated a copy of said settlement, and a correct description of the property to be charged with the lien, the correctness of which shall be verified by oath. As we have already seen, the act of 1862 declares that a failure to file this settlement shall not operate to defeat the lien as against any one except purchasers or incumbrancers without notice, whose rights accrued after ninety days, and before the account or settlement or lien claim is filed.

Appellants are not within this exception.

The record shows that there was filed in the office of the clerk of the District Court of Appanoose County, on the 31st of October, 1872, a statement by O'Hara Brothers of a claim against J. W. Barnes, the principal contractor, and against the railroad company, of a mechanic's lien on their line of said road, from Viele, in Lee County, through Van Buren, Davis, and Appanoose counties, in the State of Iowa, for work and labor done and to be done and materials furnished under Barnes's contract, in which they said they had already done work to the amount of $265,000, of which $130,000 had been paid. This was verified by the oath of O'Hara. An agreed statement of facts in the present suit states that, in filing their respective claims for mechanics' liens, settlements had been made between the sub-contractors and Barnes, and that the amounts claimed had been agreed to by Barnes in these several settlements.

It is now urged by appellants against the validity of these liens that the notice of the lien to the railway company, which the statute required from the sub-contractor, was never given, and if any direct written notice was necessary to the establishment of the lien in this suit it must be admitted that it is not proved.

But we think there are two sufficient answers to this objection: —

1. It is obvious that this notice to the owner of the property is for the purpose of enabling him to protect himself in his dealings with the principal contractor, so that he shall neither overpay the amount of the contract with the sub-contractor, nor embarrass himself by having to deal with two contractors. This dealing with two contractors instead of one being an obligation which the law imposes on him for the benefit of the sub-contractor, this notice is required for his protection. It can have nothing to do with the validity of the lien beyond ascertaining the amount of it to which the sub-contractor is entitled as between those three. With prior liens it has nothing to do, and can have no effect on the rights of the holders of them. The initial proceeding for the establishment of the lien, on which all others rest, is the claim filed in the clerk's office of the proper court. In the case of *Bundy* v. *The K. & D. M. R. Co.* (49 Iowa, 207), the Supreme Court of the State held that the paper thus filed by a sub-contractor imparted notice to the owner and principal contractor of the condition of the account between the parties.

2. Since this notice is designed for the protection of the owner, and was to be given to him, the judgment of the State court of Iowa establishing this lien against the railroad company is conclusive on that subject, and with that question the complainants in this court have nothing to do.

The next objection very strongly urged by counsel for appellants is thus stated in the assignment of errors: The court erred in decreeing a lien on the property in Davis, Van Buren, and Lee counties, the first division of the road, for work done in Appanoose County, the next division, on a contract which was dated and work begun after recording the mortgage in the latter county.

As we understand this objection, it is founded on the idea that while, if the whole road had been uninterruptedly built under one contract, the lien of the contractors and sub-contractors would have been good against the whole road, though they had contributed only to the building of a limited portion of it, yet because these sub-contractors were only employed on one division of the road, after another had been finished, and under a distinct contract with the company made after that completion, the lien can only attach to the last section of the

road, and even this is subordinate to the mortgage of the appellants.

One branch of the question here raised was very fully considered in the case of *Neilson* v. *Iowa Eastern Railway Company*, 44 Iowa, 71. That was a case where, after the building of a railroad had been commenced, a mortgage was executed on its whole line, both where work had been done and where none had been done. After this the building of the road was continued under new contracts by persons who did work on the other parts of the road, and the question was whether they had *any* lien prior to that of the mortgage, and if so, whether it extended to all the road or only to that part built under the new contracts.

The court, after mature deliberation, decided both these questions in favor of the contractors. It held that the road was an entire improvement, within the meaning of the act, and that the continuance of it was a matter to be taken into the calculation of the mortgagees when the mortgage was made, and the lien for that work was by the statute given on the road as one improvement. The court, speaking of the policy of the statute, said "it is not desirable that the execution of a mortgage upon land on which a building or other improvement is in process of construction should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it the money already expended must ordinarily to a great extent be lost. Take the present case as illustrative. The interveners are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the work. They foresaw that work and materials must be furnished by somebody, or nothing could be realized from what had been done."

But the argument most confidently urged here is that the road was built in sections, and that there was such a separation in space and time in the construction of them that they cannot be considered as one improvement within the meaning of the statute. The argument is that the road from Viele to Bloomfield is one road; that then it is interrupted, and the track of another company is used from Bloomfield to Moulton;

that there another road begins which was constructed under another contract, and that no lien for work done here can attach to the road between Viele and Bloomfield.

The argument seems to us extremely technical, and at war with the principle in which liens are allowed for work done subsequently to the creation of a mortgage. That doctrine, or rather the statute which the courts construed as giving a permanent lien under such circumstances, was in existence when the mortgage of the appellants was made. It entered into and became a part of their contract. They knew that the road was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage. Now that the venture in which both embarked is to end in loss to one or the other of them, there is no judicial propriety in straining the law to limit the rights of one party rather than those of the other. If that law by its fair construction gives the mechanic a lien for a few thousand dollars on the whole road, instead of a part of it, the law should prevail.

In every respect, except this one of its construction, the road is a unit, an entirety. Its route is selected and surveyed as one road. It is owned and built and run by one corporation. Its trains run over it all. The mortgage of appellants can have no lien on any of the road beyond the first few miles upon any other theory, for its descriptive language refers to the road as one and not as several subdivisions. It is not easy to see how it can be held to be one road for the purposes of the mortgage, and two or three pieces of road for the purposes of the mechanics' lien. This continuation of the road beyond Bloomfield was as useful to the security of that mortgage as the part between Viele and Bloomfield. Though the work was done from Moulton under another contract, there was never any suspension of the work on the whole road beyond what is usual in roads built with limited means. There was never any permanent arrest of the work, nor any intention to cease work on the road. The intersection of fourteen miles of another road between Bloomfield and Moulton does not destroy the identity of the improvement, nor convert it into two railroads.

Canal Company v. *Gordon* (6 Wall. 561), is much relied on by appellants, and in one of its features, — that now under consideration, — it bears some analogy to this case. There, however, the part of the canal first finished, and which was held not to be subject to a lien for work done on that constructed afterwards, had been in full operation for some time. How long it had been finished and in use before work was begun on the new part is not stated in the report of the case. It may have been long enough to justify the belief that for a time the further prosecution of the work was abandoned, and its resumption an afterthought.

In the case before us the purpose of discontinuing the road was never for a moment entertained, and the actual work was resumed in a few months after its completion to Bloomfield. In that case the decision depended on the construction of a statute of California which used the word "structure" where the Iowa statute uses the word "improvement."

In that case, as was said in the opinion, we had no aid from any decision of the courts of the State. In the one before us we have several decisions of the Iowa court. *Neilson* v. *Iowa Eastern Railway Company*, 44 Iowa, 71; *Equitable Life Insurance Company* v. *Slye*, 45 id. 615.

"A mechanic's lien," says the court in the latter case, "can, it is true, become paramount to a mortgage executed upon a partially erected building, provided the work be done or materials furnished for the purpose of completing the building. This is the plain provision of the statute, and, to our mind, it is not unreasonable. Whoever takes a mortgage upon a building in the process of erection, should assume that the mechanics' work is to go forward, and he may form some estimate of the amount that will be required. The same is not true in regard to repairs or enlargements."

If *Canal Company* v. *Gordon*, *supra*, is at variance with the decision of the courts of Iowa construing her own statute, we must follow the latter. They also meet our approval.

Without examining other objections to the decree, or those to the lien of Wells, French, & Co., we think what we have said covers the case.

Decree affirmed.

THE "CITY OF PANAMA."

The act of Congress approved March 2, 1853, entitled "An Act to establish the territorial government of Washington" (10 Stat. 172), enacts that the district courts of the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the Territory. *Held*, that the district courts of the Territory have jurisdiction in admiralty cases.

APPEAL from the Supreme Court of the Territory of Washington.

This is a proceeding in admiralty commenced in the District Court of the third judicial district of the Territory of Washington by Mary Phelps and John S. Phelps, her husband, against the steamship "City of Panama," owned and claimed by the Pacific Mail Steamship Company, to recover damages for personal injuries sustained by the libellant Mary Phelps while a passenger on board said steamship.

The remaining facts are stated in the opinion of the court.

Mr. Austin G. Fox for the appellants.
Mr. Philip Phillips, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Judicial power as well as legislative is conferred upon the territorial government by the organic act establishing the Territory, the provision being that the judicial power shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. Appellate jurisdiction from the district courts to the supreme court is also given, and with that view the provision is that writs of error, bills of exception, and appeals shall be allowed under such regulations as may be prescribed by law, from which it plainly follows that the district courts created by the organic act are and were intended to be courts of general original jurisdiction.

Provision is also made for writs of error and appeals from the territorial Supreme Court to the Supreme Court of the United States in the same manner and under the same regulations as are required to remove here the judgment or decree of the Fed-

eral Circuit Court for re-examination, where the value of the property or the amount in controversy exceeds two thousand dollars, or where the Constitution of the United States or an act of Congress or a treaty is brought in question.

Express power is also given to the district courts of the Territory to have and exercise the *same* jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the Territory. 10 Stat. 175; Rev. Stat., sects. 1910, 1911.

Matters of fact of a preliminary nature, disconnected with the question of jurisdiction, are not controverted; as, for example, it is not disputed that the steamship is owned by the respondent steamship company, and that she is one of the line they employ in the transportation of passengers and freight between the port of Seattle, one of the ports of Puget Sound, and the port of San Francisco, in the State of California; nor is it denied that the complaining party purchased a ticket as a cabin passenger for a passage, at the time alleged, from the former to the latter port, nor that she went on board for that purpose, and that a stateroom was assigned to her for use during the voyage by the proper officer or agent in charge.

None of these matters are denied in the argument here, and the injured party alleges that while she had stepped into her stateroom for a few minutes a portion of a concealed hatchway in the floor of the cabin near the door of her stateroom was uncovered by some of the officers, agents, or employés of the company, and was by their gross carelessness and negligence left open and unguarded, in consequence of which and without her fault she, in returning from her stateroom to the cabin, fell through the hatchway down into the hold of the steamship, a distance of about twenty feet, whereby she broke and crushed the bones of her right arm and received other grievous injuries, which, as she believes, will disable her for life.

Compensation for her injuries being refused by the company, she, her husband joining with her, instituted the present suit *in rem* against the steamship in the proper district court of the Territory to recover such redress as the law affords in such cases. Ser-

vice was made and the respondents appeared and demurred to the libel for several causes, of which the following are the most material in this investigation: (1) That the District Court had no jurisdiction of the subject-matter alleged in the libel. (2) That neither the acts of Congress nor the admiralty rules of practice promulgated by the Supreme Court apply in the courts of the territory.

Hearing was had and the District Court overruled the demurrer and the respondents excepted. Other proceedings took place before the respondents answered the libel, but they are omitted as now unimportant. Brief reference to the answer of the respondents will be sufficient, as the question of jurisdiction is the one chiefly discussed in this court. Apart from that, the material matters of defence set forth in the libel consisted of a denial that the allegations of the fourth and fifth articles were true, and the respondents expressly denied that the injuries of the complaining party were in any respect caused by the carelessness or negligence of the officers or employés of the steamship. Testimony was taken, hearing had, and the District Court having made a finding of facts entered a decree in favor of the libellants for the sum of five thousand dollars. Both parties appealed to the territorial Supreme Court, where they were allowed to adduce evidence in open court. All of the testimony introduced was taken down by the order of the court and is reported in a document called a bill of exceptions. Certain motions were made by the respective parties which are not deemed material, and the parties having been again fully heard the Supreme Court entered a decree in favor of the libellants in the sum of fifteen thousand dollars, from which the respondents appealed to this court. Since the cause was entered here the respondents have filed the assignment of errors set forth in their brief, numbered from one to eleven inclusive, of which the first two call in question the jurisdiction of the territorial courts.

Jurisdiction of the territorial Supreme Court cannot be successfully denied if it be established that the original jurisdiction of the cause was vested in the District Court, as the organic act provides that writs of errors, bills of exception, and appeals shall be allowed in all cases from the final decisions of said

District Court to the Supreme Court, under such regulations as may be prescribed by law, from which it follows that the present investigation is necessarily limited to the inquiry whether the District Court had jurisdiction to hear and determine the controversy.

Chancery, as well as common law, jurisdiction is in terms vested both in the supreme and district courts, and the same section provides that the district courts shall have and exercise the same jurisdiction under the Constitution and laws of the United States as is invested in the circuit and district courts of the United States, which is a plain reference to the enactments of Congress defining the original jurisdiction of those courts. Appellate jurisdiction is in some cases exercised by the Federal circuit courts, but inasmuch as the entire appellate judicial jurisdiction of the territory had previously been given to the Supreme Court by the same section of the organic act, it is obvious that it is original and not appellate jurisdiction that is there conferred by that clause.

Cognizance of an original character was given to the district courts, concurrent with the circuit courts, by the ninth section of the judiciary act as amended, long prior to the passage of the organic act in question, of all crimes and offences against the authority of the United States, the punishment of which is not capital, whether committed in their respective districts or upon the high seas. 1 Stat. 16; 5 id. 517.

Admiralty and maritime cognizance, original and exclusive, was also vested in those courts of all civil causes of the kind, including all seizures under laws of impost, navigation, or trade, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden. Rev. Stat. sect. 568.

Original cognizance in certain cases, concurrent with the courts of the several States, was given to the circuit courts in suits of a civil nature at common law or in equity, and of all crimes and offences cognizable under the Federal authority, except where that act otherwise provides, and concurrent jurisdiction of the crimes and offences cognizable in the district courts. 1 Stat. 88; Rev. Stat. sect. 629.

Such jurisdiction of the territorial district courts within the

respective districts is made co-extensive with both the Federal circuit and district courts, for reasons which will be obvious to any one who will compare the two sections, one with the other, in their practical operation. Two classes of courts are created in the Federal system for the exercise of the necessary original jurisdiction, but in the territory, as provided in the organic act, there is but one class of courts created for that purpose. Had Congress limited the jurisdiction of the territorial district courts to that exercised by the Federal district courts, then those courts could not have taken cognizance of controversies in patent cases nor of crimes or offences against the authority of the United States, where the punishment is death, and if their jurisdiction had been limited to that exercised by the circuit courts, then those courts would have had no cognizance whatever of admiralty and maritime causes, or of seizures on water where the proceeding is according to the course of the admiralty law.

Power to make all needful rules and regulations respecting the public territory is vested in Congress, and in the frequent exercise of that power the usual form for an organic act in such a case has become a very complete and well digested preparatory system of government. Two examples of courts having such jurisdiction are found in the tenth section of the judiciary act, where the Federal district courts in two districts were empowered to exercise jurisdiction in addition to what was conferred by the ninth section of the judiciary act of all other causes, except appeals and writs of error, made cognizable in a circuit court, and with authority to proceed therein in the same manner as a circuit court.

Argument to show that jurisdiction in admiralty cases is properly exercised by the Federal district courts under the ninth section of that act is quite unnecessary, as every one knows that jurisdiction in such cases has been exercised by those courts under that provision from the passage of the act to the present time, with the sanction of every Federal court organized pursuant to the Constitution and the laws of Congress. Doubt at one time was suggested whether those courts could properly exercise judicial cognizance in prize cases, inasmuch as the section does not in terms confer such jurisdiction, but the Supreme

Court held that prize was a branch of the admiralty and that as such jurisdiction was vested in the district courts by the ninth section of the judiciary act. *The Admiral*, 3 Wall. 609, 612; *Glass* v. *Sloop Betsey*, 3 Dall. 16.

Prior to the act of the 3d of March, 1863, the Supreme Court had no jurisdiction in prize cases, except when the same were removed here from the circuit courts, but the acts of Congress referred to provides that the decrees in such case may be appealed from the District Court directly to the Supreme Court, which leaves the circuit courts without jurisdiction in prize cases. Beyond all question admiralty jurisdiction, including jurisdiction in prize cases, was vested in the territorial district courts by the ninth section of the organic act, the explicit language of the act being that the district courts of the territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the territory.

Earnest effort is made in argument to show that inasmuch as a case in admiralty does not strictly arise under the Constitution and laws of the United States, that the clause of the organic act referred to does not vest jurisdiction to hear and determine such cases in the territorial district courts, for which proposition they refer to one of the decisions of this court. *The American Insurance Co.* v. *Canter*, 1 Pet. 511, 546.

Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way.

Cotton in bales to a large amount was shipped at New Orleans for transportation to Havre de Grace, and it appears that the ship was wrecked off Florida, from which the cotton was saved and was carried to Key West, where it was sold by order of the Territorial Court to satisfy a claim for salvage amounting to seventy-six per cent of the property saved. Prior to the loss the shippers had effected insurance, and they abandoned the same to the underwriters. Part of the cotton subsequently arrived at Charleston, when the underwriters

libelled the same as their property by virtue of the abandonment. Hearing was had and the District Court pronounced the proceeding of the Territorial Court at Key West a nullity, and ordered the property to be restored to the libellants, subject to a certain deduction for salvage. Both parties appealed to the Circuit Court, where the decree of the District Court was reversed and a decree entered restoring the cotton to the claimant, when the libellants appealed to the Supreme Court.

State courts have no jurisdiction in admiralty cases, nor can courts within the States exercise such jurisdiction, except such as are established in pursuance of the third article of the Constitution, but this court in that case, Mr. Chief Justice Marshall giving the opinion, decided expressly that the same limitation does not extend to the territories; that in legislating for the territories, Congress exercises the unlimited powers of the general and of a State government, which is a complete confirmation of the proposition that the construction given to the ninth section of the organic act by the Supreme Court of the territory is correct.

Confirmation of that view is also derived from other remarks made by the chief justice in that same case. We think, then, he said, that the act of the territorial legislature creating the court, by whose decree the cargo of the wrecked ship was sold, is not "inconsistent with the laws and Constitution of the United States," and that it is valid. Consequently the sale made in pursuance of it changed the property, and the decree of the Circuit Court awarding restitution of the property to the claimant ought to be affirmed.

Admiralty jurisdiction in that case had been exercised by a court created by a territorial statute, but the court whose jurisdiction is called in question in this case was created by the organic act passed by Congress to establish the territory. Conkling's Treatise (5th ed), 290.

Existing territories are all organized under organic acts containing similar provisions, and in most or all the Federal power is vested in a supreme court, district courts, probate courts, and justices of the peace; and the organic act of each describes the jurisdiction of the district courts in substantially the same

language, which is also found in the organic acts of former territories since admitted as States.

Our Constitution, in its operation, is co-extensive with our political jurisdiction, and wherever navigable waters exist within the limits of the United States, it is competent for Congress to make provision for the exercise of admiralty jurisdiction, either within or outside of the States; and in organizing territories Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the legislature of the territory to create such tribunals. Courts of the kind, whether created by an act of Congress or a territorial statute, are not, in strictness, courts of the United States; or, in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the third article of the Constitution, but is conferred by Congress in the execution of the general power which the legislative department possesses to make all needful rules and regulations respecting the public territory and other public property.

Six days of every term of such district courts, or so much thereof as shall be necessary, are required by the act of Congress to be appropriated to the trial of causes arising under the Constitution and laws of the United States, which of itself is sufficient to show that, in the view of Congress, their jurisdiction extends to all such matters of controversy.

Cases arising under the Constitution, as contradistinguished from those arising under the laws of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the Constitution itself, independent of any particular statutory enactment. Examples of the kind are given by Judge Story in his commentaries, which fully illustrate what is meant by that constitutional phrase. On the other hand, it is equally plain that cases arising under the laws of the United States, are such as grow out of the legislation of Congress within the scope of their constitutional authority, whether they constitute the right, privilege, claim, protection, or defence of the party, in whole or in part, by whom they are asserted or invoked. 2 Story Const., sect. 1647.

Instances where such jurisdiction has been exercised by the

territorial district courts under such acts are numerous, and they extend from the time our territorial system was organized to the present time, and the power has always been exercised without challenge from any quarter and without the least doubt of their constitutional or legal authority. Were the meaning of the act doubtful, which cannot be admitted, the rule is universal that the contemporaneous construction of such a statute is entitled to great respect, especially where it appears that the construction has prevailed for a long period, and that a different interpretation would impair vested rights — *contemporanea expositio est fortissima in lege.* Sedgw. Stats. (2d ed.) 213.

Maritime cases, in every form of admiralty proceeding, have been heard and determined in the territorial district courts, and by appeal in the supreme courts of the territories. *Cutter* v. *Steamship*, 1 Oreg. 101; *Price* v. *Frankel*, 1 Wash. T. 43; *Meigs* v. *The Steamship Northerner*, id. 91; *Griffin* v. *Nichols*, id. 375; *Phelps* v. *City of Panama*, id. 320.

Two cases, being cross-suits, were appealed to this court from decrees rendered by the Supreme Court of the territory for re-examination as admiralty appeals. Nobody questioned the jurisdiction either of the subordinate courts or of this court, and the parties were fully heard in both cases. Both decrees were reversed, and the causes remanded with directions to dismiss the libel in the cross-suit, and in the other to enter a decree in favor of the libellants for the amount of the damage. *Steamship Northerner* v. *Steam-tug Resolute*, Dec. Term, 1863, not reported.

Judges of long experience heard and decided those cases, no one of whom ever intimated any doubt that the territorial courts had such jurisdiction in admiralty causes as is vested in the Federal, district and circuit courts. For these reasons we are all of the opinion that the objection to the jurisdiction of the courts below must be overruled.

Prior to the recent act of Congress no provision was ever enacted for a trial by jury in an admiralty cause, and it is so clear that the existing provision does not afford any countenance to the complaint of the respondents, in view of the facts disclosed in the record, that it is not deemed

necessary to give the subject any further consideration. 18 Stat. 315.

Injuries of the kind alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel *in rem* against the ship; and the rule is universal that if the libel is sustained, the decree may be enforced *in rem*, as in other cases where a maritime lien arises. These principles are so well known and so universally acknowledged that argument in their support is unnecessary.

Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some few respects less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, but in most other respects the obligations assumed are equally comprehensive and even more stringent. Carriers of passengers by land, it was said in one of the early cases, are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but it was held in the same case that the smallest negligence would render the carrier liable, and that the question of negligence was for the jury. *Aston* v. *Heaven*, 2 Esp. 533.

Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert. *Hegeman* v. *The Western Railroad Corporation*, 13 N. Y. 9.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, the true requirement being that the personal safety of the passengers shall not be left to the sport of chance or the negligence of careless agents. *Philadelphia and Reading Railroad Company* v. *Derby*, 14 How. 468, 486.

Persons transported in such conveyances contract with the proprietors or owners of the conveyance and not with their

agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective ship, car, engine, or other apparatus was purchased of another, if the defect is one that might have been discovered by any known means.

Mistakes sometimes occur in the investigation of such a case by overlooking the fact that it is the carrier, whether shipowner, corporation, or individual that assumes the obligation, for a breach of which a right of action accrues to the passenger. Proof of a formal contract is not required, as the obligation of the carrier is implied from his undertaking to transport the passenger.

Tested by these considerations, it is clear that the rulings and decision of the court below are correct, and that the fourth and fifth assignments of error must be overruled. *Pendleton* v. *Kinsley*, 3 Cliff. 416, 421; *Stokes* v. *Saltonstall*, 13 Pet. 181.

Comment upon the sixth assignment of error is unnecessary, as there was no satisfactory evidence introduced by the respondents to show that the libellant was guilty of any negligence whatever.

Complaint is also made that the amount allowed for injuries received is excessive, which makes it necessary to refer to the finding of facts exhibited in the transcript, from which it appears that the libellant was wholly unaware of the hatchway, and that in coming from her stateroom she, without fault on her part, fell through it into the hold of the ship, whereby her arm was broken, and she was greatly bruised and permanently injured, as is more fully set forth in the findings and evidence.

Exceptions were filed in the District Court setting forth the evidence, which was sent up to the Supreme Court with the transcript. Due appeal having been taken by each party, the cause was heard in the Supreme Court upon the findings and evidence made and given in the court of original jurisdiction, and sent up with the transcript, together with the evidence adduced in the appellate court. Application for a rehearing was made in the Supreme Court, which was denied, and the Supreme Court made an extended finding of facts as

showing the basis of their judgment. Without entering into those details, it must suffice to say that it shows conclusively that the complaint of the respondents, that the amount allowed is excessive, is not well founded, and is therefore overruled.

Other minor objections are taken to the proceedings in the Supreme Court, all of which may be sufficiently answered by referring to that part of the organic act, which allows an appeal from the District Court to the Territorial Supreme Court, and from the final judgment of the latter court to this court, in the same manner and under the same regulations as from the Federal circuit courts. 10 Stat. 176.

Damages in such a case must depend very much upon the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted. *Railroad* v. *Barron*, 5 Wall. 90, 105; *Curtis* v. *Rochester and Syracuse Railroad Company*, 18 N. Y. 534, 543.

Viewed in the light of these suggestions we see no just ground to conclude that the amount allowed by the Supreme Court is excessive, and accordingly overrule the remaining assignment of errors. Wood's Maine, 73; *Wright* v. *Compton*, 53 Ind. 337.

Decree affirmed.

SILLIMAN v. UNITED STATES.

UNITED STATES v. SILLIMAN.

A., the owner of certain barges, executed charter-parties of them to the United States for a stipulated sum per month so long as they should be retained in the service. After they had been for some time used, he was informed by the Quartermaster-General that he must execute a new charter-party specifying a reduced compensation. A. declined to comply, and made a demand for them, which was refused. On learning the intention of that officer to retain possession of them and withold all compensation, A. executed the required charter-party, stating at the time that he did so under protest and by reason of the pressure of financial necessity. He thereafter, from time to time, received, without protest or objection, payment according to the diminished rate, and then brought suit against the United States for the difference between it and the original rate, upon the ground that the last charter-party was executed under such circumstances as amounted in law to duress. *Held*, that A. is not entitled to recover.

APPEALS from the Court of Claims.

The case as set forth in the findings of fact is this: —

In 1863, claimants were partners in trade, doing business in the city of New York, under the firm style of Silliman, Matthews, & Co. At various times they executed with the United States (the latter represented by Major Van Vliet of the quartermaster's department) several charter-parties for barges of which they were owners. The barges were delivered to the quartermaster's department, and remained in service during the periods respectively set forth in the petition. The claimants were paid at the charter rates up to and including the 31st of October, 1863.

On the 2d of June, 1863, the Quartermaster-General, by letter, instructed Quartermaster Van Vliet that all double-decked barges then in service and used for transporting cattle, horses, &c., should, from and after the 1st of that month, be made to conform to a standard of compensation at rates not to exceed four dollars per ton per month.

The owners of the barges, being notified by Major Van Vliet of the Quartermaster-General's instructions, replied that their barges were only measured as single-deck, and that the rate

of four dollars per ton per month would not pay them unless they were allowed to measure the upper deck also, and that rather than accept the reduction they preferred to have their boats discharged.

This reply of the claimants having been communicated to the Quartermaster-General, he directed Major Van Vliet to discharge the barges from service as rapidly as he could procure others upon the terms just stated, and under a new form of charter-party prescribed by the Quartermaster-General.

In reply to this direction Major Van Vliet, on the 22d of July, 1863, informed the Quartermaster-General that it was impossible to obtain barges at New York at the rates indicated by the latter, taking the registered tonnage as the standard of measurement, which represented only their hold-measurement, and not their actual carrying capacity; and that compensation at the rate of four dollars per ton of actual carrying capacity would exceed that stipulated for in the then existing charter-parties.

From July 22, 1863, till December, 1863, no further correspondence took place in regard to the barges, and they remained in the service as before.

On the 10th of December, 1863, the Quartermaster-General instructed Major Van Vliet that the double-decked barges chartered by the latter must be brought within the price stated in the letter of June 2, 1863, and that no higher rate would be allowed for them from and after Dec. 1, 1863.

This instruction having been communicated by Major Van Vliet to the claimants, the latter, on the 14th of December, having before them the form of the new charter-party which had been proposed by the Quartermaster-General, stated to Major Van Vliet, by letter, that rather than sign the new charter-party they had decided to have their barges returned to them, and that they would not let them for four dollars per ton per month.

On the 28th of December, 1863, the Quartermaster-General issued a circular-letter to several quartermasters, and assistant quartermasters, among whom was Major Van Vliet, stating that no payments would be made for charter-money for services

rendered and due after March 31, 1863, under any other form of charter-party than that which had, on the last-named date, been prescribed by the Quartermaster-General.

After the date of the last-mentioned letter, one of the claimants, Silliman, went to Washington and demanded of the Quartermaster-General the return of the barges to the claimants at New York. That officer replied that the government could not spare them; and when Silliman remonstrated with him against their retention by the government, the Quartermaster-General said the government needed the barges and would keep them, and he declined to pay the arrears then due the claimants for their services under the original charter-parties. Thereafter the claimants made repeated calls on Major Van Vliet for arrearages of money, and were informed that he was ordered not to pay them any until they had made new charter-parties.

On the 8th of January, 1864, the claimants addressed a letter to the Secretary of War, complaining of the treatment they had received from officers under him, stating that two of them had gone to Washington and could find no person who would modify the new charter-party so that they might accept the terms that could be agreed upon, and adding the following words: —

"We now complain as follows, viz.: —

"1. That we have requested that our barges be returned to New York and delivered to us as per charter-party, and have been refused.

"2. That we have 'certificates of service' for November and December, 1863, and the quartermaster at New York has orders not to pay until we make new charters, and we refuse to make them as the blank charters dictate, but are willing to make some concession in price if any person can be named here to negotiate.

"3. We desire to sell, if we cannot have our barges or obtain money for their use, as we cannot meet our obligations to our captains and crews without money to do it, and hope you will act favorably for us at an early date."

On the 5th of March, 1864, the claimants wrote to the Quartermaster-General, proposing to accept the new charter-

parties from the first of the month nearest the acceptance of the same, with certain modifications.

These modifications were accepted by the Quartermaster-General on the 19th of March, 1864, with the exception of the date offered for their taking effect, which he required should be on the 1st of April, 1863.

On the 23d of March, 1864, the claimants, by letter to the Quartermaster-General, said as follows: —

"We have been paid to November 1, 1863, and if we have to go back to April 1, 1863, we shall have to stop payment, as we have depended on this money to keep along in our business. . . . We have been told by other parties that they dated new charters from December 1, and we can see no reason that they should be favored above us. . . . We cannot go back to April 1, 1863."

To this letter the Quartermaster-General replied, on the 11th of April, 1864, that all charter-parties, without exception, executed to take effect Dec. 1, 1863, for vessels in the service April 1, 1863, had been required to take effect from the latter date.

After this letter the claimant, Matthews, went to Washington and had interviews with the Quartermaster-General and other officers in his office, in which he again remonstrated, as had before been done by his partner, Silliman; to which the Quartermaster-General replied that they had laid down the rule and were determined that nothing else should be done until the new charter-parties had been executed; that until that was done they would keep the barges and not pay for them. Said Matthews, during his visit to Washington, finally agreed with Colonel Clary, an officer in the Quartermaster-General's office, to make the new charter-parties, stating that they did so under protest and yielded to necessity, and insisting, after he had agreed to make them, that it was wrong to make new charter-parties.

On the 16th of May, 1864, in pursuance of Matthews' agreement, the new charter-parties were signed by the claimants and an officer of the quartermaster's department.

The compensation therein stipulated to be paid after Oct. 31, 1863, was, from and after that date, from time to time, paid

to the claimants for each of the barges, and when each payment was made the claimants, without objection or protest, gave a receipt therefor as "in full of the above account."

The claimants, in their petition, assert claims against the United States for certain balances, computed upon the basis of the original charter-parties, after crediting the several sums received from time to time under the last agreements or charter-parties, which they claim to have been executed under compulsion, and not, therefore, binding upon them.

They also sue to recover damages alleged to have resulted from the use of the barges in a negligent and improper manner by the agents of the government, and for injuries done to them while in the government service, not attributable to ordinary wear and tear.

The Court of Claims held claimants bound by the terms of the charter-parties last executed, but allowed a portion of the damages claimed.

Both parties appealed from the judgment.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for Silliman.

The Attorney-General, contra.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

The barges in question were delivered by claimants to the government under the original charter-parties, binding the latter to pay for their use at an agreed rate, during such period as they were retained in its service. The government was as much bound by the terms of the contracts as were the claimants, and no alteration thereof could take place without the assent of both contracting parties.

The quartermaster's department demanded that the claimants should execute new charter-parties, containing stipulations essentially different as to compensation, from those embodied in the contracts under which the government obtained possession of the barges. It announced its purpose to retain possession, and withhold all compensation, unless and until the claimants executed the proposed new charter-parties. In other words, the department informed claimants that it would not

comply with the provisions of the original contracts unless the claimants would submit to material alterations against their interests and to the advantage of the government. Claimants distinctly refused to give their assent to the proposed alterations, and asked that the barges be returned. But this reasonable request was not complied with by the agents of the government. Their conduct was in plain violation of the rights of the claimants.

Had the claimants stood upon their contract rights it is perfectly clear that the government could have been compelled to pay the amount stipulated in the original contracts to be paid for the use of the barges. The claimants could have sued for each instalment of rent as it became due, or when the government returned the barges they could have sued, as they now sue, for the whole amount due under the original charter-parties. They had a full and complete remedy by suit against the government in the Court of Claims for the enforcement of their rights under those contracts. That court had then, as it has now, jurisdiction to hear and determine all claims founded upon contracts, express or implied, with the United States. Its final judgments, sustaining such claims, were then as now made payable out of any general appropriation by law for the satisfaction of private claims against the government.

Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charter-parties, and, from time to time, received payments according to the rates prescribed therein — protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charter-parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretence that a refusal, on their part, to accede to the illegal demand of the quartermaster's department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter-parties. Nor were those charter-parties executed for the purpose, or as

a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.

We are aware of no authority in the text-books or in the adjudged cases to justify us in holding that the last charter-parties were executed under duress. There is present no element of duress, in the legal acceptation of that word. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law.

The case is one which in some aspects appeals strongly to the sense of justice of the government, which cannot afford to reap the fruits of an arbitrary abrogation by its officers, of valid, binding contracts made in its name with the citizen. If, in view of the condition of the country during the recent war, the claimants were unwilling to embarrass or imperil the operations of the government by contests in the courts as to property which, possibly, was needed by the military department for supplying the necessities of our army, these facts only strengthen their claim to relief. But that relief must come from the legislative, and not from the judicial department.

We perceive no error in the judgment, and it is, as to all parties,

Affirmed.

SCHOOL DISTRICT *v.* INSURANCE COMPANY.

1. The court announces its determination to insist upon a strict observance by counsel of all rules intended to facilitate the examination of causes, especially those submitted.
2. The submission of a cause under the 20th rule set aside for non-compliance with paragraph 4, subdivision 3, of Rule 21, which provides that "when a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length," either in or with the brief.

ERROR to the Circuit Court of the United States for the District of Nebraska.

The facts are stated in the opinion of the court.

Submitted by *Mr. E. Estabrook* for the plaintiff in error, and by *Mr. Willard P. Hall* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This cause was submitted on the 6th of January under the 20th Rule. Its decision depends on a careful consideration of several statutes of Nebraska. Rule 21 provides (par. 4, subdivision 3) that "when a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length," either in or with the brief. That rule has been entirely disregarded by both parties in this case. For this reason the submission is set aside and the cause restored to its place on the docket.

We must insist on a strict observance by counsel of all rules intended to facilitate our examination of causes, especially those submitted. Although in general the statutes of the States are to be found in the Congressional Library, we do not have them at our rooms, where necessarily cases are investigated. A little trouble on the part of counsel in obeying this particular rule, will expedite materially our labors. We take this opportunity of calling special attention to this subject.

MARQUEZ v. FRISBIE.

1. An injunction or a *mandamus* will not lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion.
2. A court will not, by reason of its jurisdiction of the parties, determine their respective rights to a tract of public land, which are the subject-matter of a pending controversy whereof that department has rightfully taken cognizance, nor will it pass a decree which will render void a patent when it shall be issued.
3. Where the legal title is vested, the equities subject to which the patentee holds it may then be judicially enforced, and where that department has upon the uncontradicted facts committed an error of law by which the land has been awarded to a party to the prejudice of the right of another, the latter is entitled to relief.
4. Where, however, there was a mixed question of law and fact, and the court cannot separate it, so as to ascertain what the mistake of law is, the decision of that department affirming the right of one of the contesting parties to enter a tract of public land is conclusive.
5. A. filed his bill in a State court, alleging that, having the requisite qualifications of a pre-emptor, he had settled upon a tract of public land, but that the proper register and receiver had refused to receive the purchase-money and issue to him a certificate therefor solely upon the ground that the Department of the Interior had on appeal decided that the tract was not subject to pre-emption under the general pre-emption laws, and issued an order authorizing e entry of the tract by B., the defendant, who claimed the right to pre-empt it under a special act of Congress, by which he will be enabled to receive a patent therefor. The bill does not show what proofs were submitted by B., but alleges that, at the instigation of him and others, the Commissioner of the General Land-Office fraudulently, and before the act passed, ordered the surveys of the lands covered by it to be withheld. The bill prayed that A. be declared to be the true owner of the tract and to have a paramount title thereto. B. demurred. *Held*, that the bill was properly dismissed.

ERROR to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Richard T. Merrick* for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The original suit was begun by a petition of the plaintiff in error in the proper court of the State of California, setting forth several reasons why the decision of the Department of

the Interior against his claim as a pre-emptor, and in favor of Frisbie and others, to a certain quarter-section of land, was erroneous, and praying a decree of the court declaring him to be its true owner and his right to the legal title paramount. The case was heard in the inferior State court on a demurrer to this petition, which was sustained, and the judgment there rendered against plaintiff was affirmed by the Supreme Court.

The grounds principally, if not exclusively, relied on by the counsel of plaintiff in this court, who so faithfully and earnestly presented his case, are, 1st, That the Land Department mistook the law of the case and thereby deprived plaintiff of a vested right in the land. 2d, That their decision was obtained by fraud.

The petition of the plaintiff, however, is so badly drawn, and has so many defects, that, sitting here to revise the judgment of two courts of the State of California, we are not able to discover in the petition that the questions argued here are so presented as to enable the court to decide them.

There are also objections besides this fatal to the complaint and the relief asked under it.

One of them is that the principal relief sought, that without which any other would be imperfect, is, that defendants may be declared to hold the land in trust for plaintiff, and compelled to convey the same accordingly. This undoubtedly means the legal title to the land, for he alleges that he was in actual possession at the time of instituting the suit and for a great many years before. But the bill does not show that the defendants, or either of them, ever had the legal title. On the contrary, it is a necessary conclusion from the allegations of the bill that the legal title is in the United States. After referring to the decision of the Secretary of the Interior against his claim, the petition says, that, "in pursuance of this decision, an order was issued authorizing the defendants and other purchasers of the Vallejo title to enter the lands claimed by them; and the said defendants have entered, and will be enabled to receive a patent for, the said quarter-section." It plainly appears from this, first, that defendants had not the legal title; second, that it was in the United States; and, third, that the

matter was still *in fieri*, and under the control of the land officers.

Nothing in record of the case before us gives evidence that any further steps in that department have been taken in the case.

We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield* v. *Register and Receiver*, 9 Wall. 552; *Gaines* v. *Thompson*, 7 id. 347; *The Secretary* v. *McGarrahan*, 9 id. 298.

And we think it would be quite as objectionable to permit a State court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued.

After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. *Johnson* v. *Towsley*, 13 id. 72; *Shepley* v. *Cowan*, 91 U. S. 330.

We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States.

If, however, we could suppose that defendants had obtained the patent which the secretary has decided that they are entitled to, that patent and the order on which it issued has in its favor all the presumptions which such an instrument necessarily carries, to which is to be added in this case the plaintiff's allegation that it was founded on a decision made after full contest and repeated hearings, by appeal and otherwise, by the officers to whom the law has specially confided the adjudication of that class of cases.

The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction.

That principle is that "the decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief." *Moore* v. *Robbins*, 96 U. S. 530, 535; *Shepley* v. *Cowan*, *supra*; *Johnson* v. *Towsley*, *supra*.

As we have already said, the argument of counsel is that the bill which was demurred to makes a case of mistake and of fraud and imposition within the meaning of these decisions.

Let us inquire first into the alleged mistake of law by the land department.

The language of this court in *Moore* v. *Robbins*, cited above, is that equity will interfere "when it is *clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another."

This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief.

Looking to the complaint in this case, no such clear statement of a mistake of law is to be found. The counsel in his argument says that the act of March 3, 1863, under which defendants as vendees of Vallejo entered the land, only protected them to the extent of their actual possession, and that the Secretary of the Interior decided otherwise to the

prejudice of plaintiff. But no such allegation is made in the complaint.

That part of the complaint which relates to this subject is, after detailing his efforts before the register and receiver, as follows: —

"But the said register and receiver refused to receive said money and issue a certificate of purchase for said land, as they had previously refused to award the same to him, and had returned the proofs with their said opinion to the General Land Office at Washington.

"The plaintiff's claim, among others, was thus rejected. But the Commissioner of the General Land Office took a different view of the law, and in certain cases, adjudicated by him, declared that the said lands were subject to pre-emption under the general laws, and sustained the rights of pre-emption settlers.

"An appeal was taken in one case to the Secretary of the Interior, who, upon the opinion of Mr. Attorney-General Speed, reversed the decision of the commissioner, and declared that the act of March 3d, 1863, above cited, has the effect to deprive the pre-emption settler of all rights under the general laws of the land. In pursuance of this decision an order was issued authorizing the said defendants and other purchasers of the Vallejo title to enter the lands claimed by them; and the said defendants have entered and will be enabled to receive a patent for the said quarter-section, although the plaintiff first reduced it to possession, and has resided continuously upon and been in the occupation of it for the last fourteen years, and justly claimed by the plaintiff under the laws of the United States."

No copy of the opinion of the Attorney-General or of the Secretary of the Interior is given, nor is there any other statement than this of what principle of law was then decided. That the decision had any reference whatever to the nature, character, or extent of the possession of the claimants under Vallejo, is a very forced inference from facts not found in the record, for the bill contains no allegation whatever of the proofs of the defendants, or of what they did or did not prove in regard to possession, except that they had not resided on the land.

To set aside the decision of the land department, declare its action to be a violation of the law, and reverse also the judg-

ments of the two courts of California on that ground, demands some stronger evidence that such a decision was made by these officers than is to be found in this petition.

So also as regards the allegations of fraud and imposition.

It is alleged in the vaguest terms that the act of Congress for the benefit of Vallejo and his vendees was procured by the false and fraudulent representations of defendants, but as no attempt is made to invalidate it, and the court is not asked to disregard it, nothing more need be said of this charge.

The next is that before the passage of that act the Commissioner of the General Land Office, at the instigation of defendants, fraudulently and unjustly ordered that the surveys of this land should be withheld by the surveyor-general. Unless the mere use of the word fraudulent makes his order a fraud, it is impossible to see any wrong in withholding these surveys while Congress was considering how far and in what manner it would relieve Vallejo and his grantees from the effect of a very hard, if technically legal, judgment in favor of the government.

It is also alleged that "defendants will, on receiving the patent, be at liberty to sell said land to innocent purchasers, and thus wholly defeat the just claim and right of plaintiff, who will thus be fraudulently deprived of the land which he has settled and improved under the guarantee of the laws of the land, and which is evidently the intent and purpose of said defendants in prosecuting their unjust and fraudulent claim to the land aforesaid."

It is too obvious for comment that in all this the only use of the words fraud and fraudulent is to stigmatize acts which are adverse to the plaintiff's view of his own rights. But there is not a syllable which defines an act fraudulent in nature, or done or performed under the influence of corrupt motives, or by corrupt means, by the defendant or by any of the land officers who have had to deal with his claim. These officers are not even named. It is idle at this day to suppose that the expensive machinery of a court of equity is to be put in operation for the purpose of reviewing and reversing the judgment of the tribunals to whom that question is by law entrusted, on such loose, untraversable allegations of fraud in

general. *United States* v. *Throckmorton*, 98 U. S. 61; Kerr on Fraud, 365.

It is urged in argument that the facts stated by plaintiff in regard to his own settlement, possession, and declaratory statement, show his right to receive a patent for the land, and that on demurrer these are to be taken as true.

We are hardly inclined to believe that if every thing so stated is to be treated as absolute verity that it makes out his right. But it is sufficient to say that plaintiff also shows that all his proofs, together with those on the other side, which he has *not* set out in his petition, were submitted to and passed upon by the land officers, from the register and receiver up to the Secretary of the Interior, and they decided against the validity of his claim.

All this appears from his own petition; so that we return to the proposition, that as he has not shown such a mistake of law, or such element of fraud in that decision as will justify a court of equity in setting it aside, the judgment of the Supreme Court of California refusing that relief is without error, and it is accordingly

Affirmed.

PLANING-MACHINE COMPANY *v.* KEITH.

1. The action of the Commissioner of Patents in granting letters-patent does not conclude the question whether there was not an abandonment. A person charged with infringing them, may show that before they were issued the patentee had abandoned his invention. The intention to abandon may be manifested otherwise than by words.
2. There may be an abandonment after or before an application for letters has been made and rejected, or withdrawn.
3. An inventor must comply with the statutory conditions. He *cannot without cause* hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it.
4. The facts concerning the application for letters-patent No. 138,462 granted to Joseph P. Woodbury April 29, 1873, for an alleged new and useful improvement in planing-machines, stated. It appears among other things that it was rejected and nothing done thereafter for many years; that he meanwhile obtained other letters, and knew that thousands of planing-machines containing his alleged invention were manufactured, sold, and used in the United States. *Held*, that his inaction, delay, and silence for more than six-

teen years were such as encouraged such manufacture and sale of it, and that the circumstances showed his abandonment of it.

5. The rule in the Patent Office, which, previous to the revised patent act of July 8, 1870, provided that "an application rejected, or not prosecuted, within two years after its rejection or withdrawal, should be conclusively presumed to have been abandoned," being at most only a rule of practice adopted by that office and not always enforced, was no bar to a movement by an inventor to have his application reinstated after its withdrawal. He might have filed a new one or applied for a re-examination or appealed; and the existence of the rule is not an adequate excuse for conduct which the court considered as manifesting an abandonment of his invention.
6. The invention of a planing-machine having a solid bed of no particular form, or specified thickness, and not requiring to be constructed in one piece, is anticipated by a machine for cutting and planing light material, having in other respects the same devices and a solid bed adequate for the purposes for which it was intended. The fact that the bed of the latter is divided by a slit running longitudinally from one end to the other, yet arranged so as to constitute one bed, makes no difference. A machine remains the same in principle, although one or all of its constituents be enlarged and strengthened so as to perform heavier work.
7. Section 4920, Revised Statutes, declares that the proofs of previous invention, knowledge, or use of the thing patented, may be given upon notice in the answer of the defendant, stating the names of patentees, the dates of their letters-patent and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where or by whom it had been used. *Held*, that only the names of those who had invented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth.
8. The court, upon the whole case, decides that said Woodbury was not the original and first inventor of the improvement for which he obtained said letters-patent No. 138,462, and that if he was, he had abandoned it to the public before they were issued.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Submitted by *Mr. A. A. Stout*, *Mr. Charles M. Reed*, and *Mr. J. A. L. Whittier* for the appellants, and by *Mr. B. F. Thurston* and *Mr. David Hall Rice* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

The bill of The Woodbury Patent Planing-Machine Company, the appellant, is founded upon letters-patent granted to Joseph P. Woodbury on the 29th of April, 1873, for an alleged "new and useful improvement in planing-machines," numbered 138,462. The specification declares the object of the improve-

ment to be presenting the material to the cutter in such a manner as both to counteract, as far as practicable, the fluttering or tremor caused by the successive blows of the knives, and the consequent wavy and uneven surface of the planed work, and at the same time to overcome more perfectly than theretofore the tendency in the knives of the rotary cutter to loosen and dislodge the knots and shakes, and to tear the fibres of the wood irregularly, instead of severing them smoothly along the exact surface desired. To accomplish this two-fold object the patentee proposed to make use of what he denominated "a yielding pressure-bar," made of such material, and of such mass, as to be rigid from end to end, with its under face flat, so that it may have an extended bearing upon the work longitudinally of the machine, and mounted upon springs, so as, within certain limits, to accommodate itself to the varying irregularities in the surface of the material operated upon. The specification then proceeds to state the patentee's supposed advantages of the alleged invention, and to describe, by reference to drawings, the patented device. The claims are four, all for combinations. They are as follows: —

1. The combination of a rotary cutter and a yielding pressure-bar or bars, substantially as and for the purpose described.

2. The combination of a solid bed and a yielding pressure-bar or bars for the purpose of holding down the material while being acted on by the cutter, substantially as set forth.

3. The combination of a solid bed, a rotary cutter, and a yielding pressure-bar or bars, substantially as described.

4. The combination of the two pressure-bars, one of which is supported upon arms, and the other upon springs, substantially as and for the purpose set forth.

It is this use of yielding pressure-bars in the combination which constitutes principally, if not wholly, the novelty of the device described in the patent. Planing machines with a solid bed, rotary cutter, and devices for receiving and transmitting the power had been known and in use long before Woodbury claimed to have made his invention. The Woodworth planing machine, substantially the first of the class, had all these in combination, and in the same combination as they are found in the machine to which Woodbury applied his yielding bars, but

instead of bars Woodworth used rollers to keep firmly in position the wood to be planed. Woodbury merely substituted bars for rollers. No doubt the substitution was an improvement. It enabled the pressure upon the wood to be brought nearer to the cutters than it could be in the Woodworth machine. It had a more extended bearing, and, therefore, held the material more steady under the action of the knives or cutters, and the bars, perhaps, were less likely to be clogged by the chips cut in the operation of the machine.

On the 2d of March, 1874, the patentee sold and assigned his letters patent to the complainant, and it brought this suit against the defendant for an alleged infringement.

The answer of the defendant denies any infringement and attacks the validity of the Woodbury patent for several reasons, any one of which, if sustained, must bar the relief which the complainant seeks. It is denied that Woodbury was the first and original inventor of the improvement claimed, and it is averred that the invention described in his patent had been publicly known and used for more than two years before his application for a patent was made, and that before that time his invention had been abandoned to the public. The answer contains other averments, which we think it unnecessary to set forth, because the controlling questions are, whether the device of Woodbury was the first and original invention, and whether, if it was, it was abandoned to the public before he obtained his patent.

Before proceeding to the consideration of the several defences set up, it will be convenient to refer briefly to the history of Woodbury's alleged invention. Though the patent was not granted until 1873, the earliest application for it was made on the 3d of June, 1848. The invention appears to have been completed in the latter part of the year 1846, a caveat for it having been forwarded to the Commissioner of Patents, as early as the 28th of May, of that year. The petition for the patent authorized and empowered J. James Greenough, as attorney for the petitioner, to alter or modify the specification, as he might deem expedient; and also to receive back any moneys which the petitioner might be entitled to withdraw, and to receipt for the same. Greenough, however, was not empowered to withdraw the application.

On the 20th of February, 1849, the application for a patent was rejected in the Patent Office, and no serious attempt appears to have been made to procure a re-examination, or to renew it, for a period of more than twenty years, though, during more than sixteen years of that time, the improved device had been in common use. In October, 1852, Greenough, the applicant's attorney, formally withdrew the application, and received back $20, of which, however, Woodbury had no notice at the time. The attorney had no sufficient authority to withdraw the application, though he had to withdraw the fee. In 1854, five years after the application had been rejected in the office, Woodbury instructed Mr. Cooper, another patent solicitor, who was acting for him in another case, to call up and prosecute anew his rejected application. This, however, was not done. Mr. Cooper, it seems probable, was deterred from taking any action in regard to the matter, by a rule which, at that time, he thought was generally enforced in the Patent Office, viz., that an application rejected, or not prosecuted, within two years after its rejection or withdrawal, should be conclusively presumed to have been abandoned. This rule was not always enforced, and it was reversed by the commissioner in 1869, and in the revised patent act of 1870, Congress enacted: "That when an application for a patent has been rejected or withdrawn, prior to the passage of this act, the applicant shall have six months, from the date of such passage, to renew his application, or to file a new one; and if he omit to do either, his application shall be held to be abandoned. Upon the hearing of such renewed applications, abandonment shall be considered as a question of fact." It was within six months after the passage of this act that Woodbury renewed his application, upon which the patent was granted.

In view of this history, and of the other facts appearing in the case, the question is a grave one, whether the invention, even if Woodbury was the first inventor, was not abandoned by him before his renewed application was made.

It is quite certain that the action of the commissioner, granting the patent in 1873, is not conclusive of the question whether there had not been an abandonment. Under the 35th section of the act of 1870, abandonment is declared to be a question of

fact. The rule of the Patent Office, though not always adhered to, had held it to be a question of law, in the cases to which it was applied, and the effect of the statute was rather to change the rule, than to make the decision of the commissioner, granting a patent, an unreviewable decision that the invention had not been abandoned. In fact, the commissioner may not be called upon to pass upon that question. No evidence respecting it may be before him, except mere lapse of time, and he has not generally the means of ascertaining what the action of an applicant for a patent has been, outside of the Patent Office. It surely cannot be claimed that patents obtained under the provisions of the 35th section of the act are any more unimpeachable than those referred to in the 24th section. By that section the commissioner is authorized to deal with the question whether the invention has been abandoned, as well as with the question whether it was in public use or on sale more than two years prior to the application. Yet, both these matters, as well as the originality of the invention, upon which the commissioner must pass, may be contested in suits brought for infringement of the patent. Such defences are allowed by the statute. It must, then, be open to every person, charged with an infringement, to show in his defence that the patentee had abandoned his invention before he obtained his patent.

It has sometimes been said that an invention cannot be held to have been abandoned, unless it was the intention of the inventor to abandon it. But this cannot be understood as meaning that such an intention must be expressed in words. In *Kendall et al* v. *Winsor* (21 How. 322), this Court said, "it is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language; such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful or negligent postponement of his claims." To the same effect is *Shaw* v. *Cooper*, 7 Pet. 292. These were cases, it is true, where the alleged dedication to the public, or abandonment, was before any application for a patent, but it is obvious there may be an abandonment as well after such an application has been made

and rejected, or withdrawn, as before, and evidenced in the same manner. In *Adams* v. *Jones* (1 Fish. Pat. Cas. 527), Mr. Justice Grier said, "a man may justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delay, not caused by the laches of the applicant, should not work a forfeiture of his rights."

The patent law favors meritorious inventors by conditionally conferring upon them for a limited period exclusive rights to their inventions. But it requires them to be vigilant and active in complying with the statutory conditions. It is not unmindful of possibly intervening rights of the public. The invention must not have been in public use or on sale more than two years before the application for a patent is made, and all applications must be completed and prepared for examination within two years after the petition is filed, unless it be shown to the satisfaction of the commissioner that the delay was unavoidable. All this shows the intention of Congress to require diligence in prosecuting the claims to an exclusive right. An inventor *cannot without cause* hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventors. It is not unfair to him, after his application for a patent has been rejected, and after he has for many years taken no steps to reinstate it, to renew it, or to appeal, that it should be concluded he has acquiesced in the the rejection and abandoned any intention of prosecuting his claim further. Such a conclusion is in accordance with common observation. Especially is this so when, during those years of his inaction, he saw his invention go into common use, and neither uttered a word of complaint or remonstrance, nor was stimulated by it to a fresh attempt to obtain a patent. When in reliance upon his supine inaction the public has made use of the result of his ingenuity, and has accommodated its business and its machinery to the improvement, it is not unjust to him to hold that he shall be regarded as having assented to the appropriation, or, in other words, as having abandoned the invention.

There may be, it is true, circumstances which will excuse delay in prosecuting an application for a patent, after it has

been rejected, such as extreme poverty of the applicant, or protracted sickness. Of such cases we are not now speaking. None of these ordinary and accepted reasons for Woodbury's inaction during the more than sixteen years that elapsed between 1854 and his presentation of the new petition upon which his patent was granted, are found in this case.

His first application, as we have seen, was rejected on the 20th of February, 1849, and he was then informed from the Patent Office that he could "withdraw or appeal." Nothing, however, was done until Oct. 4, 1852, when his attorney withdrew the application and received back $20. True, the attorney was not empowered to withdraw the application, and it does not appear that Woodbury was then informed it had been withdrawn, but he was informed that the application had been rejected, and he gave no instructions to do anything more in the case, though instructions were asked, and though he was frequently in communication with his attorney, who obtained for him another patent on the 20th of March, 1849. The rejected application was suffered to rest until Feb. 27, 1854, when Woodbury wrote to Mr. Cooper, another attorney, informing him that he had a rejected application, filed in June, 1848, for an improvement in pressure with the rotary cutter, and asking him to call up the case and get a patent for the most he could. Mr. Cooper made application for copies of the drawings and specification and for the letter of rejection, after having been informed that the application for the patent had been withdrawn; but nothing further was done except that Cooper informed Woodbury the application had been withdrawn by his former attorney. Thus the matter rested. Cooper's connection with it ceased in September, 1854. No effort was made in the Patent Office to have the rejected application reinstated, though such an effort must have been successful had it been made, and apparently Woodbury acquiesced alike in the rejection and in the withdrawal, until December, 1870, when his new application was made. During all this time he was in frequent communication with the Patent Office, prosecuting, and successfully, other applications for patents. He was not pressed by poverty to such an extent as to hinder his renewal of his application. This is shown by

direct evidence, and by the fact that he had means to sue for and obtain other patents. Nor was he unwarned of the danger of delay. Very soon after 1854, if not before, the use of planing machines containing pressure-bars in combination with rotary cutters and a solid bed, was general. The defendant's answer asserts that before Dec. 5, 1870, and since the withdrawal of Woodbury's rejected application, many thousand planing machines, containing his invention, had been constructed, sold, and used in the United States, and this assertion is accepted in the appellant's brief. This fact must have been known by him. Upon this subject the evidence is very full. As we have seen, the distinctive element of Woodbury's invention was the substitution of yielding pressure-bars for the rollers employed in the Woodworth patent. A machine patented to Joseph E. Andrews in 1845 had those pressure-bars, and Woodbury was engaged for years in selling those machines. Between 1852 and 1854 three Cornell machines of the Woodworth patent, rotary cutter, yielding pressure-bars combined with a solid bed were used by John F. Keating in his shop at Boston. Mr. Woodbury was repeatedly there while they were in use, and examined them, but he never suggested that he had any claim to the use of pressure-bars in planing machines. There is ample evidence also that hundreds of other machines containing the same device were manufactured and sold in Boston between the years 1854 and 1870, and were frequently seen by Mr. Woodbury, calling forth no remark from him indicating that they were invasions of his rights. In view of all this, it is of little importance that from time to time he expressed a hope to his brother, and, perhaps, occasionally to some others, that he should some time, and in some way, obtain a patent. Such was not his language to the public. His inaction, his delay, his silence, under the circumstances, were most significant. Though not express avowals of abandonment, "to reason's ear they had a voice" not to be misunderstood. They spoke plainly of acquiescence in the rejection of his application for a patent. They encouraged the manufacture and sale of his invention.

And there is no sufficient explanation of Mr. Woodbury's conduct, nothing which can be regarded as an adequate excuse

for it. The rule of the Patent Office was not a statutory rule. It was at most only a rule of practice in the office, and it was not inflexible. The action of the office exhibits many instances in which departures from it were made before the act of Congress of 1870 was passed, and even before Mr. Fisher, the Commissioner of Patents, abolished it. (Case of J. W. Cochran, Commissioner's Decisions, 1869.) If Woodbury did not intend to acquiesce in the rejection of his application, the rule was no bar to a movement by him to have it reinstated after its withdrawal. So he might have applied for a re-examination, or might have appealed, or might have filed a new one. Thus, he would have given notice that he did not intend to give up his invention to the public.

There is a wide difference between this case and *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486. In the latter case it appeared that after three successive rejections, the last in 1856, the application was never withdrawn nor any portion of the fee claimed. Still the applicant did not remit his efforts. He was in ill-health and wretchedly poor. But he continued to assert his expectations of ultimately obtaining a patent; made frequent applications to his friends for advances to enable him to prosecute his claim; attempted to appeal; until finally, in 1864, eight years after the third rejection, the patent was obtained. The patentee had never relaxed his vigilance. He had left nothing undone which he could. He had kept his flag constantly flying. Nobody had been encouraged by any act or inaction of his to appropriate his invention. His patent was, therefore, sustained, and sustained only because he had been guilty of no laches. The conduct of Woodbury was in striking contrast with that we have described, and which is described more fully on page 491 of the report.

We are constrained, therefore, to hold that Woodbury's invention was abandoned by him before he obtained his patent.

We also concur in opinion with the Circuit Court that the machine built by Alfred Anson, at Norwich, Connecticut, in 1843, anticipated Woodbury's invention. That machine was never patented, though an attempt was made to obtain a patent for it. On the 16th of August, 1843, Anson applied for a patent for what his specification denominated "a new and useful

improvement in the construction of the stocks of rotating cutters for dressing and cutting window-sash stuff, &c." The specification was accompanied by a model and drawings in perspective and in detail. His application, however, was rejected; and on the 20th of August, 1844, he withdrew it, and received back $20. We have before us the specification, drawings, and model, and what is better we have the original machine, with the testimony of its builder to identify it. That testimony, as well as that of other witnesses, proved clearly that the machine had at first, as it has now, all the elements in combination which compose the combinations claimed in the Woodbury patent. It had a rotary cutter. It had a solid bed under the cutter on which the material to be operated upon was placed, and over which it was moved and fed to the cutters by an endless chain. It had two yielding pressure-bars instead of rollers, adjusted by means of weights, to keep the material down on the bed, and so arranged as to cause the pressure to be felt nearer to the cutter's edge than it could be brought to bear by pressure-rollers. The yielding pressure was effected by weights, and not by springs, as in the Woodbury machine, but these are plainly mechanical equivalents for each other.

Passing, for the present, consideration of the admissibility of the evidence respecting the Anson machine, which we will notice hereafter, we proceed to observe what it proves.

The machine was built and set up in the shop of Mr. Shepard, a sash and blind maker, at Norwich, in 1843. It has been in operation there ever since, until it was taken out to be made an exhibit in this case, — a period of more than thirty years. Some slight changes have been made in it, but none in the combination described. The evidence leaves no doubt in our minds that the pressure-bars were arranged so as to be yielding, in accommodation to the uneven surfaces of the material to be shaped or planed, and that they were intended to be so arranged for such uses. Anson himself testifies that he put in the pressure-bars because he could get these nearer the cut of the cutters than he could a roller; and in his specification filed in the Patent Office he stated, "the stuff is also kept steady by means of a bar passing from the stands *M* and *N*, which bar may be raised or depressed in the same manner and simultan-

eously with the shafts which hold the cutters by means of the screws." He testifies, also, that he made the front bar with a rounded front, for the purpose of receiving the stuff, and that, driving the stuff under it, it would yield and the weights below would keep the stuff steady when it came to the cutters. Moreover, an inspection of the machine is sufficient to convince us that the bars are yielding, within certain limits, capable of adjustment to any varying thickness of the stuff to be operated upon.

The appellant contends that the Anson machine fails to be an anticipation of the Woodbury invention, because, as they say, it has no solid bed. It plainly has, however, a solid bed, adequate for the purposes for which the machine was intended and used, — for cutting and planing light material, sash, and blinds, and the bed is sufficiently solid for such uses. It may be admitted it would be too weak for general planing work upon boards or plank. It is comparatively a small machine. It would not cease to be the same machine, in principle, if any one or all of its constituents were enlarged or strengthened, so that it might perform heavier work. True, the bed is divided by a slit running longitudinally from one end to the other; but the two parts are arranged so as to constitute one bed, and it is not perceived why, if enlarged, it would not answer all the purposes of the Woodbury machine. Mere enlargement is not invention. The simplest mechanic can make such a modification. Woodbury's patent claims no particular form of a bed. It does not require the bed to be of any specified thickness, or constructed in one piece. Its purpose is to furnish a firm and unyielding support to the material when passing under the cutter, and that may be done as well by constructing the bed of two parts as of one. An anvil composed of two pieces is not the less an anvil, a solid block to resist the blows of a hammer. A solid foundation of a house may be composed of more than one stone. We cannot but think this objection to the Anson machine as an anticipating device is entitled to no weight.

Secondly, the appellant contends that the machine has no such pressure-bars as are shown and described in the Woodbury patent. This objection we have already considered, perhaps as

fully as need be. There is, it is true, a formal difference, but it is merely formal. The distinguishing feature of the patent is yielding pressure-bars in combination with two other elements. The Anson machine has those in the same combination. In both the machines they are substitutes for rollers, and intended to secure like advantages over the Woodworth patent; namely, while keeping down the stuff on the bed of the machine, to bring the downward pressure nearer to the line of the cut. If, in the Woodbury machine, the bars enable that pressure to be brought nearer than it is in the Anson (which is not apparent), the difference is only in degree of approximation. Such a difference would be effected in the Woodworth machine by simply changing the diameter of the rollers.

The third principal objection urged by the appellant is that the Anson machine fails, as a whole, to perform the functions of the Woodbury machine. If by this is meant that heavy plank cannot be planed by it, the objection is well taken. For such a purpose it would need enlargement and strengthening; but that all the elements claimed for the patentee's combination are found in it, producing the same results, differing only in degree if at all, is to us very apparent.

Upon the whole, after having studied carefully the evidence and the exhibits, we cannot doubt that every element found in the Woodbury machine, everything that was claimed by the patentee, existed in the same combination in the Anson machine, which was constructed and in full operation more than two years before Woodbury claims to have made his invention. Woodbury was not, therefore, the first and original inventor.

As the Anson machine has been in use, unchanged in the principles of its construction, from 1843, until it was taken from the shop to be made an exhibit in this case, it is not to be thrown aside as an abandoned experiment.

We have considered the case thus far, assuming that the Anson machine and all the testimony of witnesses respecting it is proper to be considered. The appellant objects, however, that most of the evidence is inadmissible, because the names of the witnesses called to sustain this defence of anticipation were not given in the answer. Section 4,920 of the Revised Statutes declares, that the proofs of previous invention, knowledge,

or use of the thing patented, may be given upon notice in the answer of the defendant, stating the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used. The statute does not declare that the names of the witnesses, who may be called to testify to such prior invention or use, shall be stated in the answer. It is only the names and residences of the persons alleged to have invented or to have had prior knowledge of the thing patented that are required.

The defendant's answer in this case, as amended, set out "that said alleged invention, described and claimed as new in the letters-patent mentioned in the bill, or a substantial or material part thereof, was, before the alleged invention thereof by Woodbury, used by Alfred Anson, formerly of Norwich, and said use was known to Noah L. Cole, of said Norwich, said use being at said Norwich, in the State of Connecticut."

Anson and Cole were both examined and testified, without any objection to their competency because of want of notice. Hence it is too late to object to their testimony now. Had objection been taken at the time, the answer might have been amended. *Graham* v. *Mason*, 5 Fish. Pat. Cas. 6, per Mr. Justice Clifford; *Brown* v. *Hall*, 3 id. 531; *Phillips* v. *Page*, 24 How. 164; *Roemer* v. *Simon*, 95 U. S. 214–220.

A number of other witnesses were examined relative to the history of the Anson machine and to show that no material change had been made in its organization from 1843 to 1876, or from the time when it was first put into operation. Their names were not given in the defendant's answer, and it is now insisted that their testimony should not be received. It is, however, doubtful, to say the least, whether any objection was made to their testifying because their names had not been given in the answer. None was made specifically for that reason. After notice had been given that the defendant would proceed to take depositions at Norwich, the solicitors of the complainant requested in writing to be informed of the names of witnesses proposed to be examined, asserting a right to such information, not under the statute, but under the English chancery rules. Clearly they had no such right under our equity

rule. The names were not given in answer to the request, and when the witnesses were called the counsel for the complainant objected to their examination "*for want of notice.*" Notice of what? The counsel of the defendant may well have understood the objection to be that the names had not been furnished in response to the application of the complainant's solicitors, rather than that they had not been set out in the answer. An objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it, if possible. Had this been done in the present case the defendant might have postponed the examination and moved to amend his answer, if such amendment was needed.

But beyond this, it seems to be settled that the true construction of the act of Congress is that only the names of those who had invented or used the anticipating machine or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded. It was so ruled by Mr. Justice Grier, in *Wilton* v. *The Railroads* (1 Wall. Jr. 195), and by Mr. Justice Nelson, in *Many* v. *Jagger*, 1 Blatchf. 376. *Roemer* v. *Simon*, 95 U. S. 214. This is all that is necessary to protect a patentee against surprise. If in regard to an invention claimed to have anticipated his own, he is informed by the defendant's answer of the names and residences of the alleged inventors, or who had prior knowledge of the thing patented, and when and by whom it had been used, it is sufficient to apprise him of the defense, and to enable him to make all needful inquiries respecting it. He need not know who are to testify in regard to the invention or use; much less does he need to know who are to testify respecting the history and use of the prior invention, after the complainant's patent has been granted.

We think, therefore, the testimony of the witnesses objected to "for want of notice" was admissible. And even without it the testimony of Anson and of Cole is sufficient to show the construction and use of the Anson machine in 1843, before Woodbury's invention was made.

Upon the whole, then, our conclusions are, that Woodbury was not the original and first inventor of the improvement for which the patent now owned by the complainant was granted to him,

and that if he was, his invention had been abandoned to the public before his patent was granted.

It follows that the decree of the Circuit Court dismissing the bill must be affirmed, with costs; and it is

So ordered.

BAKER v. HUMPHREY.

1. A. conveyed premises in 1851 to B., and took from him a mortgage for the purchase-money. Both deeds were recorded. B. never took possession. A., by an instrument recorded March 19, 1852, assigned the mortgage to C., who conveyed the premises with warranty to D., under whom complainant claims title. B. lived near the premises for years, and knew that C. and others were in adverse possession claiming title, but never claimed or intimated that he had himself any title. B. drew the conveyance of C. to D., and as a notary public took C.'s acknowledgment thereto, and was silent as to any defect in the title. B. executed a quitclaim deed of the premises in 1872 to a stranger. *Held*, that the facts made a complete case of *estoppel in pais*, and that nothing passed by B.'s deed.
2. An attorney employed by both parties to an agreement for the purchase of land for the sum of $8,000, upon discovering a defect in the title, concealed the fact from one of the parties, and in accordance with a secret agreement with the other procured a conveyance by quitclaim for the sum of $25 to E., his own brother. *Held*, that his conduct was a gross breach of professional duty, and that E. should be decreed on receiving the purchase-money, $25, to convey to the injured party the premises, with covenant against the title of E. and all others claiming under him.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill filed by Sandford Baker against George P. Humphrey, Hiram D. Hurd, Charles A. Hurd, and David Smith, to have the ostensible legal title to certain premises which had vested in Humphrey by one Chapman declared to have been fraudulently obtained, and that Humphrey be adjudged to convey the premises to the complainant. The bill was heard upon the pleadings and proofs, and dismissed. Baker appealed here.

The facts are fully stated in the opinion of the court.

Mr. Theodore Romeyn for the appellant.

Mr. George W. Dyer and *Mr John Atkinson*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity. A brief statement of the case, as made by the bill, will be sufficient for the purposes of this opinion.

On the 27th of February, 1851, one William Scott conveyed the premises in controversy to Bela Chapman, taking from him a mortgage for the amount of the purchase-money, which was $3,500.

Both the deed and mortgage were properly recorded. Chapman did not take possession of the premises. On the 29th of November, 1851, Scott assigned the mortgage to Jacob Sammons.

The assignment was duly recorded on the 19th of March, 1852. Sammons conveyed the premises with warranty to William M. Belote. From him there is a regular sequence of conveyances down to the complainant, Baker. Chapman lived near the property for years, and knew that Sammons and others were in adverse possession and claimed title, but never claimed or intimated that he had any title himself. He drew deeds of warranty and quit-claim of the premises from others claiming under Scott, and, as a justice of the peace or notary-public, took the acknowledgment of such deeds. Upon these occasions also he was silent as to any defect in the title.

The complainant entered into a contract with the defendants Hurd & Smith to sell and convey the premises to them for the sum of $8,000.

He employed Wells S. Humphrey, a reputable attorney, who, for a long time, had been employed by the complainant when he had any legal business to do, to draw the contract. Humphrey accordingly drew the agreement and witnessed its execution. Hurd & Smith thereupon took possession and held it when the bill was filed. They employed Humphrey to procure an abstract of title. In examining the title he found there was no deed from Chapman.

He thereupon sought out Chapman, and by representing to him that the object was to protect the title of clients, procured Chapman to execute a quit-claim deed of the premises to George P. Humphrey, the brother of the attorney, for the sum of $25. The deed bears date the 10th of June, 1872. George

knew nothing of the transaction until some time afterwards. An action of ejectment was instituted in his name to recover the property. Baker tendered to him $25, the amount he had paid for the deed; offered to pay any expenses incurred in his procuring it, and demanded a release. He declined to accept or convey.

The prayer of the bill is that the deed to George P. Humphrey be decreed to be fraudulent, and to stand for the benefit of the complainant; that the grantee be directed to convey to Baker, upon such terms as may be deemed equitable, and for general relief.

Such is the complainant's case, according to the averments of the bill.

The testimony leaves no room for doubt as to the material facts of the case.

The direction for drawing the contract between Hurd & Smith and Baker, was given to the attorney by Robling, the agent of Baker. Baker resided in Canada. Hurd & Smith directed the attorney to procure the abstract of title. With this Baker and Robling had nothing to do. The attorney disclosed the state of the title to Hurd & Smith, but carefully concealed it from Robling. Hurd & Smith being assured by the attorney that whatever they might pay Baker could be recovered back if his title failed, executed the contract with Baker, and declined to buy the Chapman title, but gave the attorney their permission to buy it for himself. There is evidence in the record tending strongly to show that there was a secret agreement between them and the attorney, that if the Chapman title were sustained they should have the property for $5,000, which was $3,000 less than they had agreed to pay Baker. This would effect to them a saving of $3,000 in the cost. They refused to file this bill, and declined to have anything to do with the litigation. It thus appears that, though unwilling to join in the battle, they were willing to share in the spoils with the adversary if the victory should be on that side.

There is in the record a bill for professional services rendered by the attorney against Baker. It contains a charge of $2 for drawing the contract with Hurd & Smith. The aggregate

amount of the bill is $43. The first item is dated July 5, 1871, and the last July 12, 1872. The latter is the charge for drawing the contract. There is also a like bill against Baker and Smith of $45, and one against Baker and Mears of $6. These accounts throw light on the relation of client and counsel as it subsisted between the attorney and Baker.

With respect to Chapman we shall let the record speak for itself. Vincent testifies: "I asked him, How is it, Chapman? I thought you owned that property" (referring to the premises in controversy). "He said, 'No; I never paid anything on it.' He said, 'Sammons has a right to rent. It is his property.' . . . 'I asked him how he came with the deed from Scott, and he said, 'It was only to shield Sammons; that afterwards Michael Dansmon paid the debt and the property went back to Sammons.' . . . 'When I met Bela Chapman, and he asked for Sammons and wife, he said he had drawn a deed from Sammons and wife to Belote for the premises, and wanted them to sign it.'"

Francis Sammons, a son of Sammons, the grantor to Belote, says: "A part of a house situated on that lot three was leased by my father to Bela Chapman, in 1851, for the purpose of storing goods, and he afterwards lived in it a while. I collected the rent. I think he occupied it with his goods and family about three months. He never occupied or had possession of the premises at any other time, to my knowledge. He came from Mackinac when he put the goods in that house. He remained here four or five years after he came from Mackinac. He lived in Mackinac until his death. He came over to Cheboygan several times after he went to reside at Mackinac. Sometimes he would stay a week or two, visiting. At the time he lived here he was a notary-public, justice of the peace, and postmaster. I know he was in the habit of drawing deeds and mortgages for any one that called on him. I don't think there was any one else here during the year 1852 and 1853 who drew deeds and mortgages but Bela Chapman in this village. My father sold the premises to William S. M. Belote. My father was in possession of the premises from 1846 until he sold to Belote."

Medard Metivier says: "I hold the office of county clerk

and register of deeds for Cheboygan County; have held these offices since 1872.' . . . 'I am in my sixtieth year. I came to live in this village in 1851. Lived here ever since, except about six years when I lived in Mackinac and Chicago during the war. I know Jacob Sammons and Bela Chapman; they are both dead. I remember being at the house of Jacob Sammons when a deed was executed by Sammons and wife to Belote. I witnessed the deed. That deed was witnessed by and acknowledged before Bela Chapman, as notary-public. I think there was another deed executed by Sammons and wife to Belote, which I witnessed when Bela Chapman was present. I remember the circumstances distinctly of one deed being executed, witnessed by myself and Chapman, from the fact that the room was very dark, owing to Mrs. Sammons having very sore eyes, and we had to raise the curtain for more light. There was not any other full-grown person there, unless Mr. Belote was there, about which I cannot state positively, than Mr. and Mrs. Sammons, Mr. Chapman, and myself. A part of the deed which I witnessed was in print. It was an old-fashioned form of printed deed. Mr. Chapman brought the form from Mackinac or somewhere. He only had them here. I know the premises described in the bill in this cause, and Chapman was never in possession of them to my knowledge. I know Mr. Chapman's handwriting very well, and I remember particularly that the deeds witnessed by myself and Mr. Chapman and acknowledged before him were in his (Chapman's) handwriting, and that he drew both of them. I know one of the deeds then executed by Sammons and wife to Belote conveyed the premises in question and other property; cannot tell all of the other property."

These witnesses are unimpeached and are to be presumed unimpeachable. Their testimony is conclusive as to Chapmans's relation to the property. If there could be any doubt on the point, it is removed by the fact that for $25 he conveyed property about to be sold and which was sold by Baker to responsible parties for $8,000. This fact alone is decisive as to the character of the transaction with respect to both parties. No honest mind can contemplate for a moment the conduct of the attorney without the strongest sense of disapprobation.

Chapman conveyed by a deed of quit-claim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona-fide* purchaser. No one taking a quit-claim deed can stand in that relation. *May* v. *Le Claire*, 11 Wall. 217.

There are other obvious considerations which point to the same conclusion as a matter of fact. It is unnecessary to specify them, and we prefer not to do so.

The admission of Chapman while he held the legal title, being contrary to his interest, are competent evidence against him and those claiming under him. He said the object of the conveyance to him was to protect the property against a creditor of Sammons. If such were the fact, the deed was declared void by the statute of Michigan against fraudulent conveyances (2 Comp. Laws of Mich. 146); and it was made so by the common law. The aid of the statute was not necessary to this result. *Clements* v. *Moore*, 6 Wall. 299. Nothing, therefore, passed by the deed to Chapman's grantee.

Chapman's connection with the deed from Sammons to Belote would bar him, if living, from setting up any claim at law or in equity to the premises. The facts make a complete case of *estoppel in pais*. This subject was fully examined in *Dickerson* v. *Colgrove*, 100 U. S. 578. We need not go over the same ground again. See, also, *City of Cincinnati* v. *the Lessee of White*, 6 Pet. 431; *Doe* v. *Rosser*, 3 East, 15; and *Brown* v. *Wheeler*, 17 Conn. 353.

If Chapman had nothing to convey, his grantee could take nothing by the deed.

The latter is in exactly the situation the former would occupy if he were living and were a party to this litigation. The estoppel was conclusive in favor of Belote and those claiming under him, and this complainant has a right to insist upon it.

But there is another and a higher ground upon which our judgment may be rested.

The relation of client and counsel subsisted between the attorney and Baker. The employment to draw the contract with Hurds & Smith was not a solitary instance of professional

service which the latter was called upon to render to the former. The bills of the attorney found in the record show the duration of the connection and the extent and variety of the items charged and paid for. They indicate a continuous understanding and consequent employment. Undoubtedly either party had the right to terminate the connection at any time; and if it were done, the other would have had no right to complain. But, until this occurred, the confidence manifested by the client give him the right to expect a corresponding return of zeal, diligence, and good faith on the part of the attorney.

The employment to draw the contract was sufficient alone to put the parties in this relation to each other. *Galbraith* v. *Elder*, 8 Watts, (Pa.) 81; *Smith* v. *Brotherline*, 62 Pa. St. 461. But whether the relation subsisted previously or was created only for the purpose of the particular transaction in question, it carried with it the same consequences. *Williamson* v. *Moriarty*, 19 Weekly Reporter, 818.

It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. *Hoops* v. *Burnett*, 26 Miss. 428; *Jett* v. *Hempstead*, 25 Ark. 462; *Fox* v. *Cooper*, 2 Q. B. 827.

In *Taylor* v. *Blacklow* (3 Bing. N. C. 235) an attorney employed to raise money on a mortgage learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney and that the client was entitled to recover.

In Com. Dig. tit. "Action upon the case for a Deceit, A. 5," it is said that such an action lies "if a man, being entrusted in his profession, deceive him who entrusted him; as if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover the evidence or secrets of the cause. So if an attorney act deceptive to the prejudice of his client, as if by collusion with the demandant he make default in a real action whereby the land is lost."

It has been held that if counsel be retained to defend a particular title to real estate he can never thereafter, unless his

client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. *Henry* v. *Raiman*, 25 Pa. St. 354. Without expressing any opinion as to the soundness of this case with respect to the extent to which the principle of trusteeship is asserted, it may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He cannot in such a way put himself in an adversary position without this result. The cases to this effect are very numerous and they are all in harmony. We refer to a few of them. *Smith* v. *Brotherline*, 62 Pa. St. 461; *Davis* v. *Smith*, 43 Vt. 269; *Wheeler* v. *Willard*, 44 id. 641; *Giddings* v. *Eastman*, 5 Paige (N. Y.) 561; *Moore et al.* v. *Bracken*, 27 Ill. 23; *Harper* v. *Perry*, 28 Wis. 57; *Hockenbury* v. *Carlisle*, 5 Watts and S. (Pa.) 348; *Hobedy* v. *Peters*, 6 Jurist, pt. 1, 1,794; *Jett* v. *Hempstead*, 25 Ark. 462; *Case* v. *Carroll*, 35 N. Y. 385; *Lewis* v. *Hillman*, 3 H. L. Cas. 607.

The same principle is applied in cases other than those of attorney and client.

Where there are several joint lessees and one of them procures a renewal of the lease to himself; the renewal enures equally to the benefit of all the original lessees. *Burrell* v. *Bull*, 3 Sandf. (N. Y.) Ch. 15.

Where there are two joint devisees and one of them buys up a paramount outstanding title, he holds it in trust for the other to the extent of his interest in the property, the *cestui que* trust refunding his proportion of the purchase-money. *Van Horne* v. *Fonda*, 5 Johns. (N. Y.), Ch. 388.

Where a surety takes up the obligation of himself and principal, he can enforce it only to the extent of wha he paid and interest. *Reed* v. *Norris*, 2 Myl. & Cr. 361.

Where a lessee had made valuable improvements pursuant to the requirements of his lease, and procured an adverse title intending to hold the premises in his own right, it was held that he was a trustee and entitled only to be paid what the title cost him. *Cleavinger* v. *Reimar*, 3 Watts & S. (Pa.) 486.

The case in hand is peculiarly a fit one for the application of the principle we have been considering. It is always danger-

ous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. Such a case requires care and circumspection on his part. Here there could be no objection, there being no apparent conflict of interests, but upon discovering that the title was imperfect it was the duty of the attorney promptly to report the result to Baker as well as to Hurds & Smith, and to advise with the former, if it were desired, as to the best mode of curing the defect. Instead of doing this he carefully concealed the facts from Baker, gave Hurds & Smith the choice of buying, and, upon their declining, bought the property for himself, and has since been engaged in a bitter litigation to wrest it from Baker. For his lapse at the outset there might be some excuse, but for his conduct subsequently there can be none. Both are condemned alike by sound ethics and the law. They are the same upon the subject. Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is "constructive fraud," and is sufficient. Story, Eq. Jur. sects. 258, 311.

The legal profession is found wherever Christian civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.

We shall discharge that duty in this instance by reversing the decree of the Circuit Court and remanding the case, with directions to enter a decree whereby it shall be required that the complainant, Baker, deposit in the clerk's office for the use

of the defendant, George P. Humphrey, the sum of $25, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts and against the demands of all other persons claiming under him; and it is

So ordered.

HALL v. RUSSELL.

1. The act of Congress approved Sept. 27, 1850 (9 Stat. 496), commonly known as the Donation Act, granted to each person having the requisite qualifications the right to settle upon and cultivate a tract of public land in Oregon not in any case exceeding in extent one section, or six hundred and forty acres, in order that he might, upon complying with all the prescribed conditions and making proof thereof, be entitled to a patent for such tract.
2. The title to the soil does not vest in the settler before the conditions have been fully performed. *Quære*, Does it pass from the United States until the requisite final proof of their performance be made?
3. A., an unmarried man, settled, in 1852, upon a half-section of public land in Oregon, and, after residing thereon less than a year, died. *Held*, that he had no devisable interest in the land.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The facts are stated in the opinion of the court.

Mr. William W. Chapman and *Mr. Timothy D. Lincoln* for the appellants.

Mr. George H. Williams, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a bill in equity filed by the heirs of the devisee of James L. Loring, deceased, and the administrator of Loring with the will annexed, to obtain the legal title to a tract of three hundred and three acres of land near Portland, Oregon, which, as the complainants claim, the defendants hold in trust for them. The facts material to the view we take of the case are as follows: —

In the month of April, 1852, Loring, a single man, settled

on the land in dispute with a view to becoming its owner under the operation of the Oregon Donation Act. 9 Stat. 496. He had all the qualifications necessary to enable him to take and hold under the act, but died after a residence on the land of less than a year, leaving a will, executed in Ohio in 1849, whereby he devised all his estate remaining after the payment of some small legacies, to Samuel Parker Hall, then of Cincinnati, Ohio, but now deceased.

On the death of Loring, Joshua Delay claimed the land as a settler in behalf of himself and his wife, Sarah Delay, and after a contest with the representatives of Loring before the officers of the Land Department, the heirs of the Delays succeeded in obtaining a patent. Much litigation ensued between them and the heirs of Loring about the title, but, finally, all the estate of both these parties was transferred to the present defendants, in whom it is now vested, but with full knowledge, before the transfer, of the claim of the complainants. The theory of the present suit is that Loring, by his settlement, acquired an estate in the lands which passed by his will, and that the heirs of the Delays took title under the patent issued to them in trust for the devisee of Loring as the real owner of the property. The court below dismissed the bill for the reason, among others, that Loring had no devisable estate in the lands when he died, and, consequently, his devisee took nothing by the will.

The case, therefore, in this aspect, presents the question directly whether the heirs of a settler under the Oregon Donation Act, who died before the expiration of the four years' residence and cultivation required, took by descent from the settler, or as donees of the United States. If by descent, it is conceded the settler had a devisable estate. If as donees, he had not.

The sections of the act material to the determination of this question are the fourth, fifth, sixth, seventh, eighth, and twelfth. The fourth is as follows: —

"SECT. 4. That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and

fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, 1850, the quantity of one section, or six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right; and the surveyor-general shall designate the part inuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon. *Provided*, that no alien shall be entitled to a patent to land, granted by this act, until he shall produce, to the surveyor-general of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of an intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act, shall descend to his heirs-at-law, or pass to his devisees, to whom, as the case may be, the patent shall issue. *Provided further*, that in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon. *Provided further*, that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they had received a patent therefor, shall be void. *Provided further*, however, that this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain, relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land."

The fifth provides "that to all white male citizens of the United States . . . emigrating to and settling in said Territory

between the first day of December, 1850, and the first day of December, 1853, . . . who shall . . . comply with the foregoing section, and the provisions of this law, there shall be and hereby is granted the quantity of one quarter-section . . . if a single man; or if married . . . the quantity of one half-section . . ."

Sect. 6 provides that within three months after the survey has been made, or after the commencement of the settlement, each settler shall notify the surveyor-general of the precise tract claimed by him, and that the surveyor-general shall enter a description of such claims in a book to be kept by him for that purpose.

Sect. 7 provides that, within twelve months after the survey or settlement, each person claiming a donation right shall prove to the surveyor-general that the settlement and cultivation have been commenced, specifying the time of the commencement; and that he shall, after the expiration of four years from the date of his settlement, prove in like manner the fact of continued residence and cultivation required by the fourth section; and upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the Commissioner of the General Land-Office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the Commissioner of the General Land-Office, and if the said commissioner shall find no valid objections thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof."

"SECT. 8. That upon the death of any settler before the expiration of the four years continued possession required by this act, all the rights of the deceased, under this act, shall descend to the heirs-at-law of such settler, including the widow, where one is left, in equal parts, and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

Sect. 12 provides that all persons claiming by virtue of settlement and cultivation commenced subsequently to Dec. 1,

1850, shall make affidavit that the land is for their own use and cultivation.

The rights of Loring and those who claim under him all depend on sect. 4. Whatever he took was by virtue of the grant there made. If that section gave him no devisable estate before the completion of the required four years' residence and cultivation, he had none. The other sections may be resorted to if necessary to get at the meaning of this, but this alone, when its meaning is ascertained, fixes the limit of the donation made to him.

The anomalous condition of affairs in Oregon Territory when this act was passed has been heretofore brought to our attention. *Stark* v. *Starrs*, 6 Wall. 402; *Lamb* v. *Davenport*, 18 id. 307; *Stark* v. *Starr*, 94 U. S. 477; *Barney* v. *Dolph*, 97 id. 652. For many years the inhabitants had been without any government except that which they had themselves organized for their own protection. The ownership of the soil on which they lived was in dispute between the United States and Great Britain. Under the operation of treaty stipulations for a joint occupation of the Territory, extensive settlements had grown up, and the people in governing themselves had adopted land laws which made occupancy the basis of ownership as between settlers. While waiting for the contesting sovereign claimants to determine which of the two should be the acknowledged owner of the soil, they contented themselves with regulating their rights of occupancy as between each other, trusting to the bounty of the government under whose sole dominion they should ultimately fall, for a grant of title to the land itself. The first of these acts was passed in 1844. Laws of Oregon, 1843 to 1849, 77. Under this only free males, over the age of eighteen, who would be entitled to vote if of lawful age, and widows, were entitled to hold a "claim," save that a married man under eighteen was not debarred. A claim was also confined to six hundred and forty acres or less. Permanent improvements and continuous occupation and cultivation were essential to the preservation of the rights conferred. Following this was the "Land Law," contained in the organic law of the provisional government which went into operation in 1846. Ter. Stat. Oregon (1851), 32, art. 3. This law relaxed somewhat

the stringency of the former act as to actual occupation, and extended the privilege of establishing claims to all residents of the Territory. By the act of Congress creating a territorial government for Oregon, approved Aug. 14, 1848 (9 Stat. 323), all laws theretofore passed in the Territory making grants of land, or otherwise affecting or incumbering the title to lands, were declared void, but all other laws in force under the authority of the provisional government were continued in operation so far as they were not incompatible with the constitution or the principles and provisions of that act. All laws passed by the legislative assembly of the Territory were to be submitted to Congress, and if disapproved were to be null and void. Sect. 6.

Doubts having arisen whether, after the establishment of the territorial government, the land law of the provisional government was in force, an act of the territorial legislature was passed Sept. 12, 1849, expressly declaring it to be so, and some additional provisions were made consistent with the title of the new act, which was "An Act to prevent injuries to the possession of settlers on public lands." Ter. Laws (1851), 246. By sect. 5 of this act it was provided that "land claims shall descend to, and be inherited by the heirs-at-law of the claimant, in the same manner as is provided by law for the descent of real estate." On Sept. 26, 1849, "An act respecting wills" was passed by the territorial legislature. Ter. Stat. (1851), 274. By this act every person of twenty-one years of age and upwards, of sound mind, might, by "last will, devise all his estate, real, personal, and mixed, and all interests therein, saving to the widow her dower." Before the passage of the act of September 12, if a person died in the lawful possession of a land claim, it formed part of his personal estate, and was to be disposed of by his executors or administrators for the benefit of his legal heirs. Laws of Oregon, 1843 to 1849, 61.

It was in the midst of this condition of affairs that the Donation Act was passed. Congress had the right, on assuming undisputed dominion over the Territory, to confine its bounties to settlers within just such limits as it chose. The settlers had no title to the soil, and the legislation under the provisional government, as well as that by the territorial legislature, had

no other effect than to regulate possessory rights on the public domain in the absence of congressional interference.

The opening words of sect. 4 are "that there shall be, and hereby is, granted." This is appropriate language in which to express a present grant, but as was well remarked by Mr. Justice Field for the court in *Missouri, Kansas, and Texas Railway Company* v. *Kansas Pacific Railway Company* (97 U. S. 491), "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time. Thus, in *Rutherford* v. *Greene's Heirs* (2 Wheat. 196), the grantee was Major-General Greene; *Lessieur* v. *Price* (12 How. 59), the State of Missouri; in *United States* v. *Arredondo* (6 Pet. 691), Arredondo & Son; in *Fremont* v. *United States* (17 How. 542), Alvarado; in *Schulenburg* v. *Harriman* (21 Wall. 44), the State of Wisconsin; in *Leavenworth, Lawrence, and Galveston Railroad Company* v. *United States* (92 U. S. 733), the State of Kansas; and, without particularizing further, it may be said generally that in the swamp-land cases and all the internal-improvement-grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the State or some corporation, having all the qualifications specified in the act, has been designated as grantee. In other words, when an immediate grant was intended an immediate grantee, having all the requisite qualifications, was named.

Coming then to the present case we find that the grantee designated was any qualified "settler or occupant of the public lands . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to

the provisions of the act." The grant was not to a settler only, but to a settler who had completed the four years of residence, &c., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land. Whether the fee passed out of the United States before the claim was "proved up," it is not necessary now to consider. For the purposes of the present suit it is enough to show that the occupant got no title himself, beyond that of a mere right of possession, until he had completed his four years of continued residence and cultivation.

That such was the clear intention of Congress we think is manifested in many provisions of the act. Thus, where married persons "have complied with the provisions of the act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall die before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon." This evidently related to such married persons as had completed their four years' residence and cultivation, and had done the other things required in the mean time; that is to say, had given notice of the precise tract claimed (sect. 6), and had proved the commencement of their settlement and cultivation (sect. 7). These were the provisions to be complied with "so as to entitle them to a grant." As there could be no grant until there was some person entitled to receive it, the conclusion would seem to be irresistible that, under this provision, married settlers had no estate in the land which they could devise by will, until from being

qualified settlers only they had become qualified grantees. Having completed their settlement, and nothing remaining to be done but to get their patent, their estate in the land was one they could devise by will, or which would go to the surviving husband or wife and children or heirs of a deceased married person. Not so, however, with the mere possessory rights which preceded a compliance with the provisions of the act so as to entitle the settlers to their grant of the land.

Again: "No alien shall be entitled to a patent for land, granted by this act, until he shall produce to the surveyor-general of Oregon record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs-at-law or pass to his devisees, to whom, as the case may be, the patent shall issue." An alien who had declared his intention to become a citizen, or who should do so before Dec. 1, 1850, was a qualified settler, but he was not a qualified grantee until he had completed his naturalization. As no patent could be issued to him before his naturalization, provision was made for the disposition of the "possessory right" which one who had declared his intention, after the passage of the act, could acquire as an authorized settler. By the requisite residence and cultivation accompanied by the prescribed preliminary notice and proof of claim and settlement, the alien settler could perfect his right to a patent as soon as he completed his naturalization, but until he was in a condition to "prove up" for a patent, his rights in the land were "possessory" only.

Another provision is equally significant: "All future contracts by any person entitled to the benefit of this act, for the sale of the land to which he may be entitled under this act before he or they have received a patent therefor, shall be void." This must refer to sales after the necessary residence and cultivation were complete, because the grant was only to a settler "who shall have resided upon and cultivated the same for four consecutive years." This implies continuous residence

and cultivation by the person or persons who make the claim. There is no provision by which the possession of one can be added to that of another, so as to complete the requisite term. The grant was to the occupant who had himself conformed to the provisions of the act. The sale of a possessory right could have no other effect than that of an abandonment of the settler's "claim" and a grant to the purchaser of the right to enter upon the abandoned lands and begin a new settlement of his own.

This intention is even more distinctly shown in sect. 5, which being *in pari materia* with sect. 4 may be resorted to as in some degree showing the meaning of both sections. There the language is, "that to all white male citizens . . . who shall in all other respects comply with the foregoing section, . . there shall be and hereby is granted," &c. This indicates clearly that there was to be no grant except to persons who, by complying with the provisions of the act, had qualified themselves to take.

We conclude, therefore, that under sect. 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the mean time as the statute required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will.

This brings us to the consideration of sect. 8, which, in substance, provided that if a settler died before the expiration of the required four years' continued possession, all his rights should descend to his heir-at-law, including his widow, if he left one, and that proof of his compliance with the conditions of the act up to the time of his death should be sufficient to entitle them to the patent.

Here is a plain indication that the right of the settler before the expiration of his four years' continued possession was something less than a title in fee to the land, for the provision is not that the *land* shall descend, but the settler's *rights* only. Had it been supposed that the title was already in the settler, subject only to defeasance, if the conditions subsequent to the

grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free of the conditions, instead of only the settler's rights. The object of Congress undoubtedly was to allow a settler's heirs to succeed to his possessions and thus keep his rights alive. But for some such provision all rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision and been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life, need not be decided. It is enough for this case that when their ancestor died he had nothing in the land which he could transmit to them, and that what they afterwards got came from the United States and not from him. All his rights in the land were dependant on his completion of the four years' possession, but in consideration of what he had done Congress made his heirs the special objects of its bounty if he died before his own grant had been secured. We attach no importance to the word "descend," as used in this section. In sect. 4 the word selected to convey substantially the same idea was "entitled." The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the government, instead of him.

We have not overlooked the fact that by the territorial enactments of Oregon a settler's claim might descend to his heirs as real estate, and that his possessory rights might be disposed of

by will. But all these enactments are in conflict with the act of Congress, and, therefore, inoperative. The heirs of the settler took only such title as Congress gave them. The territorial government could not add to or take from that grant. It is not contended that under the act of Congress a settler might devise his interest in the land unless the fee passed to him before his death.

It follows from this that Loring at the time of his death had no devisable estate in the land, and that the heirs of his devisee cannot maintain this suit. This makes it unnecessary to consider any of the questions that have been argued.

Decree affirmed.

VANCE v. BURBANK.

1. The decision of the officers of the Land Department is final upon the question whether a claimant under the Donation Act (9 Stat. 496), when he demanded his patent certificate as against other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the act.
2. To obtain relief upon the ground of fraud, it must appear that a party was prevented thereby from exhibiting his case fully to the department, so that it may properly be said there never was a decision in a real contest about the subject-matter of inquiry. An allegation in a bill in equity that false testimony was submitted is not sufficient, where the party had opportunity to meet it and took all the appeals which the law gave.
3. A wife, or her heirs, gets nothing under that act before her husband or some one for him proves up the claim.

APPEAL from the Circuit Court of the United States for the District of Oregon.

This is a suit in equity commenced on the 24th of December, 1877. The case made by the bill is as follows: —

On the 20th of July, 1848, Lemuel Scott, a married man, settled on six hundred and forty acres of land in Oregon, and became a claimant thereof under the laws of the provisional government. On the 27th of September, 1850, Congress passed the "Donation Act" (9 Stat. 496), the provisions of which are fully stated in *Hall* v. *Russell*, *supra*, p. 503. At the date of this act the wife of Scott lived with him on the land, and he

had all the qualifications of a "settler." The lands were not then surveyed. Mrs. Scott died April 9, 1851, leaving three children, Louisa, aged five years, Caroline, aged three years, and Almeda, aged one year. Louisa and Almeda are plaintiffs in this suit.

On the 8th of October, 1852, one Joel Perkins notified the surveyor-general of the Territory of his claim as a settler under the Donation Act to a certain tract of land. A description of this claim was duly entered in the proper book. The next day, October 9, Scott notified the surveyor-general of his claim as a married man, which was also duly entered. The same day he presented the surveyor-general with his proof of four years' residence, cultivation, &c., as required by sect. 7, and demanded a certificate of proof of compliance with the law and a designation of the part of the land inuring to himself, "and that part inuring to the said Mary Jane Scott, his wife." The claims of Scott and Perkins conflicted, and because of this the surveyor-general declined to issue a certificate to Scott.

On the 23d of August, 1853, Scott and Perkins, in order to settle and adjust the conflict of claims between them, entered into an agreement, whereby Scott was to relinquish to Perkins all the land lying south and west of a certain line pointed out by the parties at the time on the premises, and Perkins relinquished to Scott all east and north of the same line. The parties, on the same day, undertook to reduce this agreement to writing, and Perkins, representing "that he knew and had correct information as to the courses, bearings, and distances by which to describe and locate said agreed line, by referring to and connecting it with the public surveys," gave a description intended for that purpose, which was adopted.

Scott had no knowledge "of the courses, bearings, and distances to connect the agreed lines with the public surveys," and relied wholly on the correctness of Perkins's representations. It is alleged that in point of fact the description as given by Perkins was false and made to deceive, and that the line as put into the written instrument was not the same which had been pointed out on the land when the settlement was agreed to, but gave Perkins about ninety acres more than he should have had. This ninety-acre tract is the property now in dispute.

The agreement, reduced to writing under these circumstances, was signed in duplicate by both parties. Shortly after this was done, it was, as it is alleged, orally agreed between Scott and Perkins that Scott should send his copy to the surveyor-general, and if he would allow Scott to change his notification so as to make his boundaries conform to the agreement, the copy should be filed, but if he would not, the compromise was to be abandoned. On the 27th of August, 1853, Scott sent his copy to the surveyor-general, who refused to allow the change in the notification to be made. When this was done, Scott did not know of the alleged mistake in the description of the line. Afterwards, Perkins sent his copy of the agreement to the surveyor-general's office and had it filed. In the mean time, the surveyor-general, to whom Scott presented his copy, had gone out of office and a new incumbent was in his place.

On the 8th of May, 1854, Perkins, as is alleged, by means of false affidavits and the agreement thus fraudulently obtained from Scott, proved his compliance with the law under a settlement commenced June 30, 1849, and obtained a patent certificate for his claim, including the premises in controversy. Shortly afterwards, he left Oregon, and never returned. On the 2d of March, 1855, Scott, as soon as he heard of what had been done, filed his protest against the allowance of the claim of Perkins, on the ground that the affidavits produced were false. He also petitioned the register and receiver to re-examine the case, "to the end that the claim and rights of said Lemuel Scott and of the heirs of his deceased wife might be secured and protected." This application was refused.

In May, 1850, Perkins executed a deed to the board of county commissioners of the county of Yamhill, purporting to convey all his claim to a part of the disputed premises. Afterwards, the Probate Court of the county, acting as a board of county commissioners, claiming the right to enter the lands under the provisions of the town-site law of 1844 (5 Stat. 657), caused a plat and survey to be made for that purpose. On the 19th of April, 1858, the county commissioners of the county, having first obtained the permission of the Commissioner of the General Land-Office therefor, entered the land so surveyed as a town site, and the town of La Fayette is located thereon. This

plat and town embrace the land described in the deed from Perkins to the county.

On account of the conflict of boundaries between the town-site tract, the Perkins claim, and the Scott claim, Scott and the heirs of Perkins, he having died, were notified to make their contests for their respective tracts when the proceeding for the entry of the town site were pending. The children of Mrs. Scott were not notified. Pursuant to this notice, however, Scott and the heirs of Perkins did appear, and depositions were taken, but as soon as all the depositions in behalf of the town-site entry were in, and before Scott was ready with his witnesses, the case was heard and decided adversely to his claim. He then petitioned for a rehearing, which was granted on the order of the Commissioner of the General Land-Office.

In November, 1859, a deputy surveyor was appointed by the surveyor-general to make a survey of the Scott claim. This survey was made and the plat filed. Thereupon Scott demanded a patent certificate in accordance with the plat, and a designation of the part which was to be for his own benefit and that which was to be for the benefit of his wife and her heirs.

Further testimony was then taken on the rehearing which was granted by the commissioner, and on the 1st of February, 1862, the register and receiver decided against the Scott claim, and in favor of the town-site and the Perkins claim. It is alleged that on this rehearing, "in addition to the false and fraudulent evidence hereinbefore referred to, further false and fraudulent evidence of residence upon and cultivation of said Joel Perkins was produced by the heirs and representatives of said Joel Perkins, for the purpose of deceiving the officers of the land office of the United States and defrauding the said Lemuel Scott and Caroline Scott and your orators."

From this decision of the register and receiver Scott appealed to the Commissioner of the General Land-Office, and employed an attorney in Washington to look after the case. The attorney soon afterwards left Washington without notifying Scott. The appeal was heard in March, 1866, and the decision of the register and receiver affirmed. It is alleged "that in transmitting said appeal to the Commissioner of the General Land-Office, the register and receiver, from whose decision the appeal was taken,

failed and omitted to transmit therewith all the evidence which had been offered, introduced, and used on the hearing before them, and that a large number of original depositions, exhibits, and documents introduced and used in evidence before the register and receiver were not transmitted. That among the said depositions, exhibits, and documents which were not transmitted to the said commissioner, were some which had been taken, introduced, and used on behalf of said Lemuel Scott on the hearing of said contest before the register and receiver, and which strongly supported the claim of said Lemuel Scott in said contest, and that, as your orators are informed and believe, the said Lemuel Scott was wholly ignorant of the omission to transmit said depositions, exhibits, and documents, and fully supposed until within one year last past, that all the depositions and evidence used in the contest before the register and receiver had been transmitted along with the appeal." The case was heard and decided by the commissioner upon the evidence sent up and no other. Scott was not represented at the hearing by an attorney. From the decision of the commissioner Scott appealed to the Secretary of the Interior, and employed new attorneys. This appeal was heard Sept. 9, 1868, on the evidence sent up, and decided in favor of the Perkins claim. On the rendition of this decision a patent certificate was issued in due form to the heirs of Perkins, for that part of the premises not included in the town-site entry. A patent was made out ready for delivery March 14, 1872, but at the time of the commencement of this suit it had not been called for. A patent was issued and delivered to Yamhill County on the town-site entry some time in 1866.

Caroline Scott died Aug. 28, 1864, leaving her father her sole heir-at-law. Louisa was married to James Vance in 1866, and Almeda was married to Livy Swan during the same year. On the 15th of October, 1877, Lemuel Scott conveyed to his two surviving daughters all his interest in the property.

Some of the defendants claim title under the town-site entry, and some under the Perkins patent.

The prayer of the bill is in substance that the Perkins patent and the town-site entry may be declared invalid as against the complainants, and that the defendants may be required to con-

vey to the complainants such title as they respectively hold under the patent or entry.

The defendants demurred to the bill. This demurrer was sustained and the bill dismissed. From that decree this appeal has been taken.

Mr. W. Lair Hill for the appellants.
Mr. J. N. Dolph, contra.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

So far as this suit depends on the original title of Lemuel Scott, it is clear, under the well-settled rules of decision in this court, that there can be no recovery. The question in dispute is one of fact; that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the donation act. This was to be determined by the Land Department, and as there was a contest, the contending parties were called on in the usual way to make their proofs. They appeared, and full opportunity was given Scott to be heard. He presented his evidence and was beaten, after having taken the case through by successive stages on appeal to the Secretary of the Interior. This, in the absence of fraud, is conclusive on all questions of fact. We have many times so decided. *Johnson* v. *Towsley*, 13 Wall. 72; *Warren* v. *Van Brunt*, 19 id. 646; *Shepley et al.* v. *Cowan et al.*, 91 U. S. 330; *Moore* v. *Robbins*, 96 id. 530; *Marquez* v. *Frisbie*, *supra*, p. 473. The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi-judicial tribunals are.

It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter

has actually been presented to or considered by the appropriate tribunal. *United States* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute.

The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. The last decision was given by the highest department officer. If the evidence he presented to the register and receiver was not all considered on these appeals, it was clearly his own fault. It was more than six years from the time his first appeal was taken before the final hearing was had. No fraud is charged on the register and receiver, or on the heirs of Perkins in respect to the keeping back of the evidence. If any was in fact not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests. He does not now state what the omitted evidence was, or that it was anything more than cumulative. The extent of his averment is that it strongly supported his claim in the contest. For all we know, the other evidence might have been equally strong, and might have covered the whole ground.

As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the Land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been presented to the Land Department, and, therefore, is concluded by the decision of that tribunal. Under these circumstances it would be gross injustice to attempt to open that inquiry at this late day in favor of Scott himself, or any one claiming under him upon his own title, irrespective of any his wife may have had.

This brings us to inquire as to the rights of the children and heirs of the deceased wife. In *Hall* v. *Russell* (*supra*, p. 503) we held that a grant to a settler did not take effect as against

the United States, so as to pass any thing more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation, and a full compliance with all the other conditions of the act. The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. In the view we take of the case, it is unnecessary to decide when a settlement became perfected so as to establish a claim, or whether, if the wife died before the end of the four years, her heirs would be entitled to her half when the grant was completed. The question here is whether the wife, or her heirs, gets any thing before the husband, or some one for him, proves up the claim.

The "settler" is made by the statute the actor in securing the grant. He must notify the surveyor-general of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the act, and he, or some one for him, must also make the final proof. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband. If contests arise, he is the party to be notified. He represents the claim, and whatever binds him binds all interested through him in the questions to be decided. For this reason, whatever might have been the rights of the children of Mrs. Scott if the claim had been successfully "proved up," their father was their representative in making the proof, and they must abide the consequences of what he did or omitted to do in their behalf. It follows that, notwithstanding the infancy of the children, the decision of the Land Department concludes them as well as their father.

This disposes of the case, and the decree is

Affirmed.

CANAL COMPANY *v.* RAY.

The terms of a contract under seal may be varied by a subsequent parol agreement.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Richard T. Merrick for the appellant.

Mr. Walter D. Davidge for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

Assuming the facts to be such as are averred in the bill, and not denied in the answer, we have this case: In 1860 the complainants were engaged in enlarging the machinery and capacity of their flouring mill, situate near the canal of the defendants, between it and the Potomac River, and dependent for its power upon water obtained from the canal. While thus engaged it was agreed between them and the defendants that for a stipulated rent they should have full right, permission, and authority to draw from the canal, for the uses of their mill, so much water as would pass through an aperture of specified dimensions, in an iron plate not exceeding an half inch in thickness, on certain conditions. The first of these related to the form of the aperture and its capacity. The second was that the aperture should not be placed nearer the canal bottom proper than two feet. The third prohibited any attachment, contrivance, or device to increase the quantity of water that could be drawn through the aperture above what could be drawn if such device were not used. The fourth required that a sliding gate or gates should be placed in front of the aperture, so that the whole water-power granted might, as occasion under the provisions of the contract required, be entirely or partially stopped from passing through it. The fifth condition related to the construction of the forebay, the aperture and sliding gates, requiring them, *inter alia*, to be put down, constructed, and hereafter kept in repair at the sole cost of the complainants, under the special direction and superintendence, and subject in every particular to the approval of such officer of the company

as might be charged with that duty. The sixth condition was that, in like manner, at the sole cost of the grantees or complainants, and under the special direction of the officers of the company charged with that duty, such alterations should be made from time to time in the forebay or trunks, cover, or bridge aperture, and sliding gate or gates as might be considered necessary by the company or their officers, *to prevent or lessen the inconvenience to the navigation of the canal and the use of its towing-path, which might be found to arise from said use of the water, or that might be thought necessary by the company for the greater security of the canal or of its works.* The seventh condition reserved to the company the right of full ingress and egress, by their officers, to and from the premises of the grantees for the purpose of examining, repairing, and preserving the fixtures and works connected with drawing off the water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, occasioning leakage from the canal, or endangering its security and that of its works, and also for ascertaining whether more water was drawn off than was granted by the contract. The remaining conditions need not be noticed. They have no possible bearing upon the matter now in controversy.

Obviously this grant of the water privilege contemplated that the aperture, the trunk or forebay, and the sliding gate or gates should be constructed after the grant was made. To that extent the contract was executory. It did not expressly require that the aperture and guage should be located at the bank of the canal, in front of an opening there made, though probably such was the understanding of the parties. But conceding that it was, and that the contract in terms required such a location, it was nevertheless competent for the parties in the subsequent execution thereof to substitute another location in place of that first contemplated, and if such a change was made by mutual consent it amounted to a compliance with the provi-

sions of the contract. The company, after having accepted or acquiesced in a location of the aperture and gate at a point nearer the complainants' mill than the canal bank, could not afterwards complain that the condition respecting the location had not been performed, unless a right to require arbitrarily a change was reserved.

The bill avers that after the enlargement of the complainants' mill had been completed, the works for conducting the water from the canal to the mill, and for measuring the quantity of water granted by the contract, were constructed and located under the special direction of the engineer and superintendent of the canal company, the officers charged with the duty, and with their approval, and that with like approval the aperture or gauge, and sliding gate thereat, were constructed and located at the wheel of the complainants' mill, where they have since remained, having been repeatedly inspected and approved by the officers of the company. This averment is, at most, only evasively denied. The answer does indeed deny that the gauge and sliding gate were located at the wheel of the complainants' mill with the knowledge and consent of the company, and denies that such location was made with the approval or by the direction of the officers of the company, "*if it is meant by the averment*" (of the bill) "*to that effect that such arrangement was intended as permanent, or as other than a temporary indulgence.*" Such an equivocal denial cannot be considered as breaking the force of the complainants' allegation. Then, what is the effect of that averment? If, in executing the contract between the parties, the gauge and sliding gate were placed at the wheel of the mill with the knowledge of the company and with their consent, and if the location was thus made under the special direction of their engineer and superintendent, the officers charged with the duty; if for years the location remained unchanged and unchallenged, having been repeatedly inspected and approved by the company's proper officers, as averred in the bill and not denied, it would be grossly inequitable to hold that the location was not intended by both parties to be an execution of the contract, and accepted as such. Especially is this true when the location was made at the cost of the grantees of the water, and when, at the time when the works were

thus constructed and located, there was also placed at the opening of the forebay into the canal, as part and in consideration thereof, and at the cost of the grantees, a gate to enable the company to control the water-power granted, in accordance with the provisions of the grant. And it matters not that the company may not have intended such location of the gauge to be permanent, unless such was the understanding of both parties, which is not averred. There can be no doubt that a party to a contract imposing mutual obligations may accept, as performance by the opposite party, some other thing than that specifically designated; and if he does, he cannot afterwards insist upon exact performance. Nothing is more common than such fulfilment of contract obligations. In equity it is certainly regarded as sufficient fulfilment. In the present case the location of the aperture and sliding gate at the mill wheel, instead of at the canal bank, effectuated the leading purpose of the contract, which was to give the complainants a specified quantity of water; and the company was fully protected by an additional gate at the canal, at the entrance of the forebay, by which they were enabled conveniently to control the flow of water to the mill.

This, however, is not all the case. On the 23d of February, 1865, some other millers having preferred requests that they might be allowed to draw at the wheels of their mills the quantity of water leased to them by the canal company, the board of directors of the company adopted the following resolution: —

"*Resolved*, that the superintendent of the Georgetown division, under the direction of W. E. Smith, C. E., be directed to place the water-gauges for the mills at Georgetown at such point as may be deemed most advisable to effect the objects of the respective water grants, and to limit the flow of water to the quantity to which the lessees are severally entitled: *Provided*, that said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them; and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, as contemplated by the

lease, and that this resolution shall not in any manner change or impair the provisions or requirements of the respective leases granted to said parties."

On the 25th of the same month the several millers, together with the complainants in this case, gave their written consent to the resolution, and requested that their water-guages should be placed upon their respective premises, at or near the water-wheel. This resolution (made a contract by the acceptance of its provisions) certainly cannot be construed so as to deprive the complainants of the right they had previously acquired. It was intended mainly for the benefit of the other millers whose water-guages were not located at the wheels of their respective mills. And though the complainants assented to it, and thus subjected themselves to the obligations prescribed, they did not thereby agree that the location of the gauge at their water-wheel might be changed at the pleasure of the company, without cause, or for any reasons except such as were specified in the grants of water to them. The proviso declared that the board of directors might alter or change the position of the gauge, "as contemplated by the lease." That means that the company reserved the same power to change the location which they had by the original contract. It stated expressly that the resolution should not in any manner change or impair the provisions or requirements of the respective leases granted to the parties. Now, what were the provisions of the leases, or contemplated by them, respecting changes in the position of the water-gauges? They are to be found in the sixth condition upon which the grants of water were made. They are that such alterations in the forebay or trunk, cover, or bridges, aperture, and sliding gate or gates, from time to time shall be made, as the company or their officer charged with that duty might consider necessary "to prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing path, which may be found to arise from the use of said water, or that may be thought necessary by the said company for the greater security of the said canal or of its works." No right was reserved to require such alterations arbitrarily, or for any other cause than one of those thus specified, and none to enforce such a requirement by stopping the flow of the water. It

is admitted here by stipulation that the company has no knowledge of abuses by the complainants of the privileges conceded to them by the resolution of February, 1865, necessitating a change of their gauge to the canal bank for the purpose of navigation, or in respect of the tow-path, or for the security of the canal or of its works. The change required, therefore, is without any cause that justifies a demand that it be made — without the existence of any circumstance that, by the conditions of the grant, authorized the company to enforce it.

It is said on behalf of the appellants that the contract of lease between the canal company and the complainants, being a sealed instrument, could not be changed by any instrument of a less formal nature. From this it is inferred that neither the action of the company's officers in 1860 nor the resolution of 1865 could change the provisions of the grant. It is admitted that the company could waive any conditions therein for the benefit of the grantors, — such as the condition that the guage should be at the canal bank, — but is insisted that such a waiver would amount to no more than a license, revocable at will. But were it conceded that the location of the gauge at the water-wheel of the complainants' mill was in pursuance of a mere license, the license, when followed by the expenditure of the licensee's money in the construction of the works, on the faith of it, became a contract irrevocable by the grantor. The case, however, does not rest on that ground. The location of the gauge in 1860, under the direction and with the approval of the officers of the company charged with the duty of directing and superintending its construction, was, as we have said, an execution of the contract in that regard and not an alteration of it. And if it was not an execution of the contract, the resolution of 1865, accepted by the complainants, was a contract on sufficient consideration, which the parties were competent to make. Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. *Dearborn* v. *Cross*, 7 Cow. (N. Y.) 48; *Le Fevre* v. *Le Fevre*, 4 Serg. & R. (Pa.) 241; *Fleming* v. *Gilbert*, 3 Johns. (N. Y.) 527. These are cases

at law. Numerous others might be cited. The rule in equity is undoubted.

The objections we have thus expressed lead directly to an affirmance of the decree rendered by the court below. In 1873, thirteen years after the gauge had been constructed at the water-wheel, the canal company required the complainants to place the gauge and sliding gate at the canal bank and threatened to shut off the water from the mill if the requirement was not complied with. The company had no right to make and had none to enforce such a requirement, except in the cases specified in the leases, and those cases have now no existence.

Decree affirmed.

RAILWAY COMPANY *v.* PHILADELPHIA.

1. A company incorporated by a statute of Pennsylvania approved April 8, 1864, was authorized to construct a railway on certain streets of Philadelphia, subject to the ordinances of the city regulating the running of passenger railway cars. The charter requires, among other things, that the "company shall also pay such license for each car run by said company as is now paid by other passenger railway companies" in said city. That license was $30 for each car. An ordinance passed in 1867 increased the license charge to $50, and in 1868, by a general statute the legislature provided that the passenger railway corporations of Philadelphia should pay annually to the city $50 as required by their charters for each car intended to run on their roads during the year, and that the city should have no power to regulate such corporations unless authorized by the laws of the State expressly in terms relating to those corporations. The company paid the increased charge until 1875. On its refusing to pay it thereafter this suit was brought. *Held*, that the charter did not amount to a contract that the company should never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated.
2. In their widest sense, the words employed in the charter mean that the company should not then be required by the city to pay any greater charge as license than that paid by other companies possessing the same privilege. *Quære*, without further legislation, could a greater sum have been exacted from the company?
3. *Semble*, that even if the charter were sufficient to import a contract, the legislature, under the constitutional provision then in force touching the alteration, revocation, or annulment of any charter in such manner that no injustice be done to the corporators, had ample power to pass the act raising the license fee from thirty to fifty dollars.

ERROR to the Supreme Court of the State of Pennsylvania.

This was an action brought in the Court of Common Pleas, No. 2, for the county of Philadelphia, by the city of Philadelphia against the Union Passenger Railway Company of Philadelphia.

The following case was stated for the opinion of the court, with the right to either party to sue out a writ of error to the judgment.

That by "An ordinance supplementary to an ordinance entitled 'An ordinance to regulate passenger railways,' approved July 7, 1857," approved April 1, 1859 (139), and by the third section thereof, it is provided, —

"That each and every passenger railway company shall pay into the office of the chief commissioner of highways in the month of January of each year, for the use of the city, the sum of thirty dollars for each car intended to be run upon any road, and for each and every car placed upon any road before the time herein provided for paying the license, a proportionate sum shall be paid until the succeeding January, and that no car shall be placed or run upon any road or street until it shall be regularly licensed, and a certificate duly numbered hung in a conspicuous place in said car."

That the defendants were created a body politic by an act passed April 8, 1864 (P. L. 297), with the authority to construct a railway on certain named streets in the city of Philadelphia. Among other things in said act, it is enacted, —

"SECT. 4. . . . Said railway shall conform in gauge to the passenger railways now laid in the city of Philadelphia. . . .

"SECT. 8. . . . And the said company is hereby authorized and empowered to construct and lay the said railway, without obtaining the consent of the city councils of the city of Philadelphia; but whenever the said railway shall be laid and used, by running passenger cars thereon, the said company shall be subject to the ordinances of the city of Philadelphia regulating the running of passenger railway cars."

"SECT. 10. That the said company shall pay annually into the treasury of the city of Philadelphia, for the use of said city, whenever the dividends declared by said company shall exceed six per cent per annum, on the par value of the capital stock thereof, a tax of

six per cent on such excess over six per cent, . . . and the said company shall also pay such license for each car run by said company as is now paid by other passenger railway companies in the city of Philadelphia."

By "a further supplement to an ordinance to regulate passenger railways, approved July 7, 1857," approved Jan. 2, 1867 (1), it is enacted, —

"That each and every passenger railway company shall pay to the chief commissioner of highways the sum of fifty dollars for each car run upon their respective roads." . . .

That by "An Act to define the duties and liabilities of passenger railway corporations in the city of Philadelphia," approved April 11, 1868 (P. L. 849), it is enacted, —

"That the several passenger railway corporations in the city of Philadelphia shall pay annually to the said city, in the month of January, the sum of fifty dollars, as required by their charters, for each car intended to be run over their roads during the year, and they shall not be obliged to pay any larger sum; and said city shall have no power by ordinance or otherwise to regulate passenger railway companies, unless authorized so to do by the laws of this Commonwealth, expressly in terms relating to passenger railway corporations in the city of Philadelphia." . . .

That in each year previous to the year 1875 the defendants paid the said plaintiff the sum of fifty dollars for each of the cars run by them during such year.

The defendants, in the month of January, 1875, did run seventy-nine cars on their road, and admit their liability to pay to the plaintiffs for each car the sum of thirty dollars and no more.

If the court shall be of opinion that the plaintiffs are entitled to recover the sum of fifty dollars for each car, then judgment to be entered for the plaintiffs at that rate; if not, then judgment to be entered for the plaintiffs at the rate of thirty dollars for each car. The damages to be assessed by the prothonotary.

It is agreed that any act of assembly or ordinance of the city of Philadelphia which may be pertinent to the case here stated shall be considered as embraced herein.

Judgment was rendered in favor of the city at the rate of fifty dollars for each car. It was affirmed by the Supreme Court of the State, and this writ was then sued out. The errors assigned are set out in the opinion of this court.

Mr. David W. Sellers and *Mr. F. Carroll Brewster* for the plaintiff in error.

The contract between the State and the company arose by the acceptance of the charter by the corporators acting thereunder. It must therefore be construed as of *that date*. The franchise conferred was subject to certain terms, among which were that whenever the dividends declared should exceed six per cent per annum on the par value of the stock, a tax of six per cent should be paid on such excess, and that a license for each car run, such as was *then* paid by other passenger railway companies, should be paid.

The annual charge on each car is not technically a tax. Taxation is imposed by the State and city under general laws, and no exemption is here claimed from their exercise. The taxing power of the city conferred by the statute of Aug. 25, 1864, extends to all subjects of taxation specified by sect. 32 of the act of April 29, 1844. It does not, therefore, reach the cars of the company, as they are necessary to the enjoyment of the franchise. Under that section every thing incidental to, or inseparable from, the franchise is exempt from taxation. *Navigation Company* v. *County*, 8 Watts & S. (Pa.) 334; *Navigation Company* v. *Commissioners*, 11 Pa. St. 202.

The power of the city to open and repair streets does not interpose any barrier against the paramount authority of the State to grant the right to construct railways over them on such terms and conditions as the legislature may prescribe. *Case of The Philadelphia and Trenton Railroad Company*, 6 Whart. (Pa.) 25; *Stormfeltz* v. *Turnpike Company*, 13 Pa. St. 555; *Mercer* v. *Railroad*, 36 id. 99. The terms and conditions which are set forth in the company's charter exclude by necessary implication the exercise by the city of any power which would interfere with the enjoyment of the franchise, or diminish its value, even if such power had been, as it was not, vested in the city by pre-existing legislation.

The ordinance of the city passed pursuant to a later statute,

and imposing burdens upon the franchise greater than those specified in the charter, is in direct conflict with the contract clause of the Constitution of the United States, and void.

Mr. Charles E. Morgan, Jr., and *Mr. W. Nelson West*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Stipulations, in a statute of a State, exempting certain property, rights, or franchises from taxation, or engaging that the same shall be taxed only at a certain rate, if made for a valuable consideration received by the State whose legislature enacted the stipulation, is a contract, and as such comes within the rules of decision specifying the description of contracts entitled to protection from modification or repeal under the guaranty of the tenth section of the first article of the Constitution.

Exemptions of the kind, however, are to be strictly construed, the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms, and that in order that it may be effectual it must appear that the contract was made in consequence of some beneficial equivalent received by the State, it being conceded that if the exemption was granted *only* as a privilege it may be recalled at the pleasure of the legislature. Cooley, Const. Lim. (4th ed.) 342; Cooley, Taxation, 146.

Companies were created by the legislature of the State, more than thirty years ago, for running street cars in the streets of the plaintiff city, whose charters made it necessary that the managers should obtain the consent of the city councils before they commenced to use and occupy the streets for that purpose. Ordinances were accordingly passed by the city authorities which required companies organized under such statutes to pay for the use of the city a license fee of thirty dollars for each car intended to be run. Subsequent charters of the kind were granted by the legislature which did not contain any provision requiring the companies or their agents to procure the consent of the authorities of the city before they could use the public streets for the running of their passenger cars. These companies denied the validity of the license charge, which gave rise to litigation and to new legislation, by which authority was given to the city councils to provide by ordinance for the pro-

per regulation of omnibuses or vehicles in the nature thereof, and to that end it was enacted that they might from time to time pass ordinances to provide for the issuing of licenses to as many persons as may apply to keep and use omnibuses or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor, and to provide for the punishment of the owners and drivers of the same for any violation of the provisions of the ordinances to be created by virtue of the authority conferred. Sess. Laws Penn. (1850) 469.

Authority was by that act expressly vested in the city authorities to pass ordinances upon the subject therein described, and to charge a reasonable annual license fee for the license or other sum for the same. Pending the period during which that enactment continued to be in operation the legislature of the State passed the act incorporating the defendant company, with the powers, privileges, duties, and obligations expressed in the act of incorporation. Id. (1864) 300.

Corporate privileges of the usual character are by the charter granted to the company, and the tenth section provides that whenever their dividends shall exceed six per cent per annum on the par value of the capital stock, the company shall pay for the use of the city a tax of six per cent on such excess over six per cent on the par value, and that they shall also pay "such license fee for each car run by the company as is now paid by other passenger railway companies."

Railway companies running cars on the streets of the city were required to pay at the time the defendant company was incorporated, for each and every car intended to be run, the annual license fee of thirty dollars, as appears by the ordinance then in force and fully set forth in the agreed statement of facts. Annual payments to that amount, it seems, were made by the defendant company, which may be inferred from the fact that the plaintiff city makes no claim for any deficit during that period.

Coming to the matter in controversy, it appears that the legislature, on the 11th of April, 1868, passed the act which is the principal subject of controversy. Sect. 1 provides that the passenger railway corporations of the city shall pay annually to the city in the month of January, the sum of fifty dollars, as

required by their charters, for each car intended to run over their roads during the year, and that they shall not be obliged to pay any larger sum; and the same section provides that the city shall have no power to regulate such companies unless so authorized by the laws of the State. Sess. Laws Penn. (1868) 849.

Regular payments, as required, were made by the defendant company until the year 1875, when they refused to pay any greater sum than thirty dollars per year for each car run. Payment of the excess beyond thirty dollars being refused, the authorities of the city instituted the present suit in the common pleas to recover the balance as claimed. Service was made, and the parties having appeared, filed the agreed statement of facts exhibited in the transcript. Hearing was had, and the court of original jurisdiction rendered judgment in favor of the plaintiff city for the sum of $4,218.60. Dissatisfied with the judgment, the defendant company removed the cause into the Supreme Court of the State, where the judgment was affirmed. Still not satisfied, the defendant company removed the cause into this court, and assigns for error the following causes: 1. That the act of the legislature defining the duties and liabilities of railway companies is in conflict with that provision of the Constitution which prohibits a State from passing any law impairing the obligation of contracts. 2. That the judgment of the court below is in conflict with that provision of the Constitution.

Attempt was made about the time the defendant company was incorporated to support the theory that a street passenger car was not a vehicle in the nature of an omnibus, and that the street passenger cars were not taxable in any form under the legislative act which authorized the city authorities to issue licenses to persons to keep and use omnibuses or vehicles in the nature thereof, upon the ground that the street passenger car was not a vehicle in the nature of an omnibus. Controversy arose, and the Supreme Court of the State effectually disposed of the question in favor of the city.

Questions of importance were decided by the court in that case, most or all of which are more or less applicable to the case before the court. They are as follows: 1. That a grant to a corporation to carry passengers in cars over the streets of

a city does not necessarily involve exemption from liability to municipal regulations, the right granted being neither greater nor less than that possessed by a natural person. 2. That when a corporation is authorized to pursue a specified business within a municipality it is intended that the business shall be conducted under the rules, restrictions, and regulations which govern others transacting the same business. 3. That the right to construct cars and own a railway neither enlarges nor diminishes the right to run cars and carry passengers, and that a reasonable charge for the use of the privilege to transact such a business is not a denial of the right. 4. That an ordinance requiring passenger cars to be numbered and pay a stipulated sum when licensed is a valid police regulation, and that such an ordinance might be passed under the act which authorized the city authorities to pass ordinances for the licensing of omnibuses and other vehicles of conveyance of a like nature.

Since that decision it is not doubted that the subject of imposing license fees, in cases like the present, is within the jurisdiction of the city authorities, if the statute under which they have exercised such jurisdiction is a valid act passed in pursuance of the Constitution.

When the company was incorporated the charter, as before remarked, contained the provision providing for the payment of a six per cent tax on the excess of dividends over six per cent on the par value of the stock, and the further provision that the company shall also pay such license for each car run as is now paid by other passenger railway companies in the city. What the defendants contend is that the closing enactment of the section amounts to a contract that the railway company shall never be required to pay any greater license-fee than was then required of such companies running passenger cars on the streets of the city. Other railway companies at that time paid an annual license of thirty dollars, and the defendants insist that the act of the legislature increasing the license to fifty dollars per annum is unconstitutional and void.

Two answers are made to that proposition by the plaintiff city, either of which is sufficient to show that the judgment must be affirmed: 1. That the language of the act of incorpo-

ration referred to does not amount to a contract of any kind, and certainly not to such a contract as that attempted to be set up by the defendants. 2. That even if the language employed in the charter is sufficient to amount to a contract that the license charge should not exceed the amount paid at that date by other such companies, still it cannot benefit the defendants for the reason that the Constitution of the State in force when the act of incorporation was passed provides that the legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens, subject only to the condition that the alteration, revocation, or annulment shall be made in such manner "that no injustice shall be done to the corporators." Art. 1, sect. 26; Purdon, Dig. (9th ed.), p. 17.

Exemptions of the kind set up are to be strictly construed, but it is unnecessary to invoke that canon of construction to any considerable extent, as the language employed is not sufficient to take the case out of the rule that the alleged exemption will not be sustained unless it be expressed in clear and unambiguous terms. Taken in their widest sense, the words employed are no more than sufficient to warrant the construction that the legislature intended that the corporation should not then be required to pay any greater charge as license than other companies were required to pay for the same privilege, and it may perhaps be regarded as a guaranty against invidious exemptions adverse to the corporators in future legislation upon the subject, but it is plain that there is nothing in the language of the section to warrant the court in holding that the legislature intended to contract that the license charged for such passenger-cars should never exceed the annual sum of thirty dollars.

Railway companies of the kind, it appears, were first required to pay an annual sum of fifty dollars for each car run the year previous to the passage of the act which is the subject of controversy in the present litigation. Neither party refers to that act as of any importance in this case, except as a part of the State legislation upon the subject. Then comes the act in controversy, to which reference has already been made. 9 Sess. Laws Penn. (1868) 848.

When the street railway system of the city was comparatively in its infancy the city authorities, under the legislative act empowering them as such authorities to charge reasonable fees for granting licenses to such companies, fixed the sum at thirty dollars per annum for each car run. Regulations of the kind were in force and operation when the charter of the defendant company was granted. Other companies previously incorporated were at the time paying only that sum per annum for each car, and the tenth section of the charter granted to the defendant company provided that the then new company should pay the same as was paid by the other passenger railway companies.

Beyond doubt they were required to pay the same amount as was paid by the other companies, and it is perhaps a reasonable construction that without further legislation they could not be required to pay any greater sum, but the language of the section does not in terms contain any such prohibition. None of the other companies have any such immunity from increased taxation, and if construed to have that effect in favor of the defendant company it would have an extremely invidious operation at the expense of all other similar companies. Invidious exemptions are not favored, nor ought they to be, as they are in principle utterly opposed to the rule of equality, which ought always to prevail in imposing public burdens.

Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. *Crawford* v. *Burrell Township*, 53 Pa. St. 219; Cooley, Taxation, 152. Common burdens should be sustained by common contributions, regulated by fixed rules, and be apportioned, as far as possible, in the ratio of justice and equity. *Sutton* v. *Louisville*, 5 Dana (Ky.), 28, 31.

Viewed in the light of these suggestions it is clear that the State never made such a contract with the defendant company as that supposed in the assignment of errors.

It seems that the Supreme Court of the State, when it became their duty at an earlier period to examine the question, came to the conclusion that the power to impose the license or tax might be supported as a police power derived under the act passed for the regulation of omnibuses or vehicles in the nature

of the same, it appearing that at that time no legislative act had conferred the express power to tax the cars of the company. *The Frankford, &c. Railway Co.* v. *City of Philadelphia*, 58 Pa. St. 119–124.

Since that the act in question in this case has been enacted, which itself requires all such companies without discrimination to pay the annual license or tax of fifty dollars for each car intended to be run over the city roads during the year.

Stress it appears was laid in the court below upon the words of the act, "as required by their charters," as if the obligation did not arise unless it was created by the terms of the charter, but the Supreme Court showed conclusively that the act of the legislature, when properly construed, did not sustain the proposition, and it appears to have been abandoned. Charters of the kind, as the Supreme Court showed in the opinion given in this case, required obedience to the lawful ordinances of the city under the exercise of its municipal powers, which, as the Supreme Court there say, is plainly evidenced by the remainder of the section imposing the tax of fifty dollars, by which the legislature took away from the city all power by ordinance or otherwise to regulate passenger railways, "unless authorized by the express terms of a law referring directly to such corporations."

Voluntary payments of the amount imposed by the new act were made by the company for sixty or seventy cars, from which the Supreme Court of the State held that it followed as a legal conclusion that the company had accepted the act.

All power to regulate such companies by ordinance or otherwise was taken away from the city during that period, and the Court held that inasmuch as the company had enjoyed the benefit of that prohibition ever since it was enacted, it must be understood that they have accepted the act. Some weight is doubtless to be given to that argument, but it is clear that the right of the State to impose such a tax, rate, or imposition in the future cannot be taken away by mere implication arising from a direction to pay a certain sum, the universal rule being that it requires some plainer negative of the power of the State to levy moneys for public purposes than is found in such a di-

rection. Indications of such an intention might perhaps be found in other statutory provisions, sufficient, when added to such a direction and when taken together as a whole, to amount to a contract to relinquish the power; but when it is sought to prove such an exemption the statutory evidence of the same must be plain and unambiguous, and if not direct it must at least be such as is inconsistent with any other hypothesis, and conclusive that such was the intention of the legislature. Cooley, Const. Lim. (4th ed.) 341.

Much discussion of the second proposition, in view of the conclusive support given to the first, is quite unnecessary. Power to alter, revoke, or annul any charter of incorporation was vested in the legislature by the Constitution more than a quarter of a century before the defendant company was incorporated.

Even when the language of the charter is sufficient to amount to a contract, it was twice admitted by Mr. Justice Story, in *Trustees of Dartmouth College* v. *Woodward*, that alterations and amendments may be made in the charter, where the power for that purpose is reserved to the legislature in the act of incorporation. 4 Wheat. 518, 708, 712.

Acts of incorporation granted subsequently to the adoption of the Constitution must be construed as if the provision of the instrument in question was embodied in the charter. Private charters of the kind importing such an exemption are held to be contracts, because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified; and the general rule is that the grant of the franchise on that account can no more be resumed by the legislature, or its benefits be diminished or impaired without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation, or by some immemorial usage or general law of the State in operation at the time the charter was granted. *Holyoke Company* v. *Lyman*, 15 Wall. 500, 511.

Charters of private corporations duly accepted, it must be admitted, are in general executed contracts, but the different provisions, unless they are clear, unambiguous, and free of

doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms. *Rice* v. *Railroad Company*, 1 Black, 358; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420.

Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporators. Sedgwick, Stats. (2d ed.) 292; *Lees* v. *The Manchester & Ashton Canal Co.*, 11 East, 644.

Vested rights, it is conceded, cannot be impaired under such a reserved power, but it is clear that the power may be exercised and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. *Pennsylvania College Cases*, 13 Wall. 190, 218.

Tested by these considerations, it is clear, even if it be admitted that the language of the charter is sufficient to import a contract, that the power of the legislature under the Constitution is amply sufficient to justify that department of the State to pass the act raising the license for each car from thirty to fifty dollars.

Judgment affirmed.

LOVELL v. DAVIS.

1. A charter-party for the voyage of a vessel from New Orleans to certain designated ports contains a recital that said vessel is "now lying in the harbor of New Orleans," while in point of fact she was then at sea. In an action by the master of the vessel upon the charter-party the jury was instructed that if the defendants knew at the time of executing it that the vessel was at sea, the words "now lying in the harbor" being merely a representation, should be regarded as of no significance. *Held*, that there was no error in the instruction.
2. The charter-party fixed no definite time for the vessel to be at New Orleans ready to receive her cargo. *Held*, that if the master used reasonable diligence in bringing her to that port, the defendants were bound by the contract.
3. Where the bill of exceptions does not show what answer was made to a question put to a witness, error cannot be assigned upon the question.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought against Lovell & Bailey on a charter-party entered into by them March 14, 1871, for a voyage of the American ship "Adorna," "now lying in the harbor of New Orleans," from the port of New Orleans to Liverpool, between Havre and Hamburg, both inclusive, or Cronstadt. It was agreed between the parties that "this charter shall commence when the vessel is ready to receive cargo at the place of loading, and notice thereof is given to the party of the second part or their agent, and to end on a true delivery of cargo at the port of discharge."

The defence was that by reason of the plaintiff's delay in presenting his vessel at New Orleans for receiving the cargo, the defendants had rescinded the contract, and were justified in doing so. A verdict and judgment were rendered for the plaintiff, the master of the chartered vessel. The defendants sued out this writ of error.

The remaining facts, and the instructions to the jury, are set forth in the opinion of the court.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the plaintiffs in error.

No counsel appeared for the defendant in error.

MR. JUSTICE MILLER, after stating the facts, delivered the opinion of the court.

The charter-party contains a recital that at the date of its

execution the vessel was lying in the harbor of New Orleans, while the bill of exceptions shows that she was then at sea. The court charged the jury that if at the time the defendants signed the charter-party they knew that the ship was at sea, the words "now lying in the harbor of New Orleans" should be regarded as of no significance.

That language in the charter is not a warranty or contract, but a representation; and if the charterers *knew* certainly that the vessel was not there, of course they were not deceived or misled by the recital, which was probably part of a printed form that attracted no attention. The evidence on the subject of this knowledge is not in the record, and it is, therefore, to be presumed in favor of the action of the court that it was full and complete. There was no error in this instruction.

The court also charged the jury that as the charter-party fixed no definite time for the vessel to be at New Orleans ready to receive the cargo, the master was bound to use reasonable diligence in bringing her to the port, and was bound to use no more. If he did, the defendants were bound by the contract. If he did not use such diligence, they were not. To this charge also defendants excepted.

To the charge in the abstract there could be no just objection.

But plaintiffs in error argue, in effect, that it was not warranted by the testimony.

The evidence tended to show that the master was compelled to cross the bar at the mouth of the Mississippi and to sail one-fourth of the way up the river to the city without the aid of a steam-tug (which was the usual mode of carrying such vessels up to New Orleans), because no such tug was in sight, and that then a tug which offered itself at the request of the defendants was refused because of the exorbitant charge asked for the remaining part of the voyage. The bill of exceptions does not set out all of the evidence, and what is found there is very meagre, especially on this point.

Under what precise circumstances the master refused the aid of the tug which offered its services, to what extent its offer was exorbitant, how it came to be sent there by defendants, and then refused to serve without excessive compensation, are all unknown to us, but were probably clear to the jury. The

charge by the court that the master was bound to use due and reasonable diligence furnished the general rule of law. If there was anything in reference to his refusal to employ the tug which made a more definite instruction proper, counsel for defence should have asked for it. But none was prayed.

We are not able to see, therefore, any error in the charge of the court.

A question was asked the master as to what he would have done if the tug-boat had offered to take him up the river at the usual rates, to which defendants objected, and the question being permitted they excepted.

The answer is not given, and we cannot tell, therefore, whether it was favorable to plaintiff or defendants. It is settled law, at least in this court, that under such circumstances it is the evidence given which constitutes the error, if there be one, and this must be shown by the answer. *Nailor* v. *Williams*, 8 Wall. 107.

We see no error in the record.

Judgment affirmed.

RAILROAD COMPANY *v.* UNITED STATES.

1. A party claiming a credit which by reason of his laches was not presented to the accounting officers of the treasury and disallowed in whole or in part by them cannot set it up in an action brought by the United States against him for the recovery of a debt.
2. By the act of July 13, 1866 (14 Stat. 135, sect. 103 of the act of 1864, as amended), "every . . . corporation owning . . . any railroad . . . engaged or employed in . . . transporting the mails of the United States upon contracts made prior to Aug. 1, 1866, shall be subject to and pay a tax of two and one half per cent of the gross receipts" from such service. In a suit against a railroad company to recover said tax no express contract for carrying the mails was proved, but it appeared that the company had been carrying them, and that the services for which it had been paid commenced before Aug. 1, 1866, and continued without interruption until Jan. 1, 1870. *Held*, 1. That the law implies that a contract was entered into prior to Aug. 1, 1866. 2. That the company is liable for that tax.
3. A railroad company paid, Aug. 1, 1870, to the holders of its bonds $61,495 as interest then due. *Held*, that the company was liable to the United States to a tax of five per cent on that amount.
4. The "tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date," by any railroad company, is a tax on the interest, not as it accrues, but when it is paid.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This is an action by the United States against the Western Union Railroad Company, a corporation of Wisconsin, to recover certain internal revenue taxes alleged to have accrued from Aug. 1, 1862, to Dec. 31, 1871. The company filed a general denial of the allegations of the complaint, and in addition thereto set up a counter claim.

The plaintiff, to maintain the issue on its part, introduced statements from the books of the defendant, which were admitted to be true, from which it appeared that the gross amount of all receipts of the company for the transportation of passengers between Aug. 1, 1862, and July 1, 1864, was $190,863.68; that its entire gross receipts from and after June 30, 1864, until Aug. 1, 1866, were $1,427,685.36; that its gross receipts for fares and carrying the mails, from Aug. 1, 1866, until Jan. 1, 1870, were $605,770.09, and that of the said last amount $61,676.01 were for carrying the mails, and $544,094.08 for fares.

It further appeared from the books of the company, that there were no net earnings subject to tax in this suit. There were entries crediting the agent of its bondholders with interest on bonds of the Northern Illinois Railroad, from July 1 to Dec. 31, 1864, the sum of $38,876.00, and from Jan. 1 to Dec. 31, 1865, a like credit to him for interest on said bonds, $33,648.54; and in the year 1866 a like credit of $24,372.25; upon which the plaintiff claimed that it was entitled to a tax of five per cent. It further appeared from said books that interest on the bonded debt to the amount of $61,495.00 fell due Aug. 1, 1870, and was paid by the company on or after that date; that interest to the amount of $53,767.65 on the bonded debt became payable Feb. 1, 1870, and was paid on or after that date; and that $52,929.37 became due and payable on the bonds Aug. 1, 1871, and was paid on or after that date by the company.

The plaintiff, to further maintain the issue on its part, offered to show by said books that, Feb. 1, 1872, the further sum of $52,423.71 became due and payable on the said bonds, and was paid on or after said date, to which the defendant

objected on the ground that said evidence was incompetent and immaterial. The court overruled the objection and the defendant excepted. The plaintiff then showed that the sum of $52,423.71 so became due and payable Feb. 1, 1872, and was paid on or after that date, and claimed and insisted that the plaintiff was entitled to a tax of two and a half per centum on five-sixths of said amount.

The plaintiff then rested, and the defendant called as a witness one Ranney, who testified that he was secretary and treasurer of the company and had charge of its books and papers, and he as their bookkeeper had charge of the books of said company from Feb. 22, 1866; that he had examined the company's books, papers, and files, and found therein no reference to any contract for carrying the mails; that so far as he could ascertain from his examination no such contract was ever made, and that he had no knowledge thereof.

He further testified that that portion of the road between Freeport and Savannah was known and called as the Northern Illinois Railroad, and that the bonds mentioned as Northern Illinois Railroad bonds were issued on that road; that said road was a part of the road operated by the Racine and Mississippi Railroad, and that it was consolidated with the Western Union Railroad in January, 1866, and that all of the earnings of said road for the whole time mentioned in the declaration are included in the books of the company; and that on the consolidation of the said company with the Western Union Railroad Company the latter company succeeded to all its rights, privileges, franchises, and liabilities. That the entries in the books of interest paid on bonds of Northern Illinois Railroad, to wit, $38,876, $33,648.54, and $24,372.25, were made to show the relative rights of the bondholders of the different portions of the entire road, and that in fact no interest was ever paid upon such bonds, except the sum of $2,360.67, and that said accounts still remain open and unsettled upon the books, and that there never were any net earnings of said company to pay interest on said bonds, and that no such interest was ever paid; but at the time of the change of management, July 1, 1869, he understood that the said bonds were arranged or settled, but in what way he was unadvised.

The defendant then introduced in evidence vouchers for taxes paid by it, amounting to $58,832.23, and they show the payments made from month to month to the collector of internal revenue for the district in which the defendant's office was located, including taxes on account of receipts for transportation of mails.

The defendant also offered and read in evidence in addition thereto a voucher in the words and figures following, to wit:—

"(*Official.*)

"TREASURY DEPARTMENT,

"OFFICE OF INTERNAL REVENUE,

"$3,866.66.] WASHINGTON, Nov. 7, 1865.

"Rec'd from Northern Illinois Railroad Company, by the letter of first instant, 3,866.66 dollars in certificate of deposit 689, issued by First National Bank, Milwaukee, on account of internal revenue tax on interest on bonds.

"C. H. PARSONS,

"*Cashier Internal Revenue.*

"*Treasurer Northern Illinois Railroad Company, Racine, Wis.*"

"THE FIRST NATIONAL BANK OF MILWAUKEE,

"MILWAUKEE, WIS.

"$3,866,66.] MILWAUKEE, Nov. 1, 1865.

"I certify that The Northern Illinois Railroad Co. has this day deposited to the credit of the Treasurer of the United States thirty-eight hundred sixty-six $\frac{66}{100}$ dollars, on account of internal revenue for taxes on coupons, for which I have signed triplicate receipts.

"No. 689.

"H. H. CAMP, *Cash'r.*

(Across the face:) "Triplicate.

"This will be retained by the depositor for his own use and security.

"1865, November 1st, Government tax.

"To cash, $3,866.66.

"Amount paid this day by dr'ft on N. Y. to T. J. Emerson, coll., for tax on coupons rem'ning due Oct. 1, '68, to Aug. 1, '65.—W. V. B.

"Aug. 1, 1865.	Tax	$666 66
April 1, „	„	1,000 00
Oct. 1, 1864.	„	1,000 00
April 1, „	„	600 00
Oct. 1, 1873.	„	600 00"

The defendant then asked that it should be credited in this suit as against the claims proven by the plaintiff the said amount of $3,866.66 as mentioned in said voucher, but the court being of opinion that no interest was, in fact, ever paid on said bonds of the Northern Illinois Railroad Company, no tax was ever due or payable thereon, but inasmuch as said $3,866.66 had been paid on account of such tax, the defendant was not entitled to have credit allowed therefor in this suit. To which ruling the defendant excepted.

The defendant further requested the court to rule and decide that the plaintiff was not entitled to a tax of two and a half per cent upon the said $61,676.61 received by the company for transportation of the mails from July 1, 1866, to Jan. 1, 1870, but the court refused to do so, and decided that, although there was no evidence of a contract bearing date prior to Aug. 1, 1866, and no proof of an express contract, yet as the mails were carried and compensation received therefor the law would imply a contract, and therefore that the plaintiff was entitled to said tax on that amount; to which ruling and decision the defendant excepted.

The defendant further requested the court to decide that the plaintiff was not entitled to a tax of five per cent upon the amount of $61,495.00, the amount of interest paid on the bonds of the company on or after the first day of August, 1870, but that a tax of only two and a half per cent was due thereon; but the court refused so to decide, but on the contrary decided that the plaintiff was entitled to a tax thereon of five per cent; to which ruling and decision the defendant also excepted.

The defendant further requested the court to decide that the plaintiff was not entitled to a tax of two and a half per cent on five-sixths of $52,423.71, the amount of interest paid on the bonds of the company on and after Feb. 1, 1872; but the court then and there refused so to decide, but decided that the plaintiff was entitled to said tax of two and a half per cent; to which ruling and decision the defendant excepted.

The case having been tried without the intervention of a jury, the court below rendered judgment in favor of the United States for $5,933.70. The company thereupon sued out this writ, and assigns for error that the court erred, —

1. In refusing to allow the sum of $3,866.66, paid Nov. 7, 1865, by the Northern Illinois Railroad Company, to be credited to the account of the defendant.

2. In deciding that a tax of two and a half per cent was due the plaintiff on the sum of $61,676.61, received by the defendant for transportation of the mails from July 1, 1866, to Jan. 1, 1870.

3. In ruling that a tax of five per cent was due plaintiff upon the amount of $61,495 of interest paid on the bonds of the company on or after Aug. 1, 1870.

4. In admitting evidence to show that the sum of $52,423.71 became due and payable for interest on the bonds of the defendant, Feb. 1, 1872, and that the same was paid.

5. In deciding that a tax of two and a half per cent was due the plaintiff on five-sixths of the amount of interest paid on its bonded debt Feb. 1, 1872.

Mr. John W. Cary for the plaintiff in error.
The Solicitor-General, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The different assignments of error in this case will be considered in their order.

1. As to the claim for a credit of $3,866.66 on account of taxes erroneously assessed and collected, Nov. 7, 1865.

Sect. 951 of the Revised Statutes provides that "in suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed in whole or in part," save under certain circumstances not material to this case. Sect. 3220 of the Revised Statutes authorizes the Commissioner of Internal Revenue, "on appeal to him made, to remit, refund, and pay back all taxes . . . that appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected."

It does not appear that this claim was ever presented to the accounting officers of the treasury for allowance, on appeal or otherwise, or that it has ever been disallowed. For this rea-

son, notwithstanding its apparent equity, the credit was properly refused in this suit. *Halliburton* v. *United States*, 13 Wall. 68; *United States* v. *Giles*, 9 Cranch, 212.

2. As to the tax of two and a half per cent on the amount received for the transportation of mails between July 1, 1866, and Jan. 1, 1870.

By the act of July 13, 1866 (14 Stat. 135, sect. 103 of the act of 1864 as amended), "every . . . corporation owning . . . any railroad . . . engaged or employed in . . . transporting the mails of the United States upon contracts made prior to Aug. 1, 1866, shall be subject to and pay a tax of two and one half per cent of the gross receipts" from such service.

No express contract for carrying the mails was proven, but since the service for which the compensation was paid began before August 1, and was continued without interruption for the whole term in question, the court below implied a contract prior to that time. This, we think, was right. Had payment been refused and suit brought against the United States in the Court of Claims, to recover for the service rendered, there could be no doubt about the right to recover, notwithstanding the jurisdiction of that court is confined to suits on contracts (*Salomon* v. *United States*, 19 Wall. 17); and this not alone because the service had been rendered, but because it is to be presumed that when the company commenced the transportation it had been agreed that payment should be made for what was done.

3. As to whether taxes are payable on interest falling due Aug. 1, 1870, at the rate of five per cent or two and a half per cent.

The ruling of the court below on this point was in accordance with our decisions in *Stockdale* v. *Insurance Companies*, (20 Wall. 323), and *Railroad Company* v. *Rose*, 95 U. S. 78.

4. As to the tax on interest due and payable Feb. 1, 1872.

The act of 1870 (16 Stat. 260, sect. 15) provided "that there shall be levied and collected for and during the year 1871 a tax of two and one half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any" railroad company, "and on the amount of all dividends of

earnings, income, or gains hereafter declared," "whenever and wherever the same shall be payable, . . . and on all undivided profits . . . which have accrued and been earned and added to any surplus, contingent, or other fund."

The interest in this case was neither payable nor paid in 1871, and as the tax is not leviable or collectible until the interest is payable, we see no way in which the company can be charged on this account. The tax is not on the interest as it accrues, but when it is paid. No provision is made for a *pro rata* distribution of the burden over the time the interest is accumulating, and as the tax can only be levied for and during the year 1871, we think, if the interest is in good faith not payable in that year, the tax is not demandable, either in whole or in part.

There is no question here of earnings, for the finding is not as to what was earned by the company during the year 1871, but as to what was paid in 1872 on account of interest then for the first time falling due. We are aware that at the present term we held, in *Railroad Company* v. *Collector* (100 U. S. 595), that the tax levied under the act now in question was essentially a tax on the business of the corporation, and that in order to secure its payment it was laid on the subjects to which the earnings were to be applied in the usual course of business; but as this tax could not be levied until 1872, and there is no finding of any earnings in 1871, we see nothing to be taxed under that rule. In *Barnes* v. *Railroad Companies* (17 Wall. 309) it appeared expressly that the dividends were declared out of the earnings of 1869.

It follows that to the extent of $1,092.16, and the interest thereon, the judgment below was wrong, but in all other respects right. Consequently the judgment below will be reversed, and the cause remanded with instructions to enter a judgment against the railroad company for . . . $5,933 70
Less 1,092.18

Equal to $4,841.54
And interest thereon at six per cent from March 1, 1872.

So ordered.

NOUGUÉ v. CLAPP.

The Circuit Court of the United States cannot revise or set aside the final decree rendered by a State court which had complete jurisdiction of the parties and subject-matter.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Bentinck Egan for the appellant.
Mr. Philip Phillips, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a bill in chancery, which was dismissed by the decree of the court below for want of jurisdiction.

The bill, though very informal, sets out certain proceedings in the State court of Louisiana for the parish of St. John the Baptist, under which real property on which the complainant held a mortgage for a large amount had been sold, which, if permitted to stand, cut off the lien of his mortgage. These proceedings were based ostensibly on notes and mortgages given by himself to one Emory Clapp for the purchase-money of the property. The bill alleges, however, that Schexueyder Brothers, to whom plaintiff had sold the property, had assumed the payment of those notes as part of the consideration of the sale to them, and had given him a mortgage for over $14,000 in addition; that after said Schexueyder Brothers had in fact paid off said mortgage to Clapp, they entered into a fraudulent conspiracy with him to have the property sold under that mortgage for the purpose of cheating the complainant out of the $14,000 due him by defeating his lien on the land; that a suit was commenced in a parish of which the complainant was not a resident, of which he had no sufficient notice, though he was by the petition made a party; that in this proceeding a summary order of sale was had; that before the sale the plaintiff applied to the judge and obtained an order for injunction, which the clerk refused to issue, and the property was sold to said Clapp for the sum of $10,000. He charges that the refusal of

the clerk to issue the writ of injunction was a part of the fraudulent conspiracy to cheat him out of his lien on the land, and that the whole proceeding is void. He also alleges that his loss or damage by this proceeding is $20,000, for which he prays a judgment or decree.

To this bill Clapp filed what is called an exception to the jurisdiction, a demurrer, and a plea. Both the exception and the demurrer are founded on the proposition that the bill being the equivalent of a proceeding in the State courts to procure a declaration of nullity of a judgment, can only be filed in the court which rendered the judgment. The plea sets up a proceeding in the State court on a monition whereby, under the laws of Louisiana, after a judicial sale, certain proceedings in the nature of notice to all the world are had, and a judgment of confirmation of the sale is rendered.

The final decree of the court is thus set out in the record: —

"This cause came on to be heard on the plea in bar, exception, and demurrer to complainant's bill, and was argued by counsel.

"On consideration whereof it is ordered, adjudged, and decreed that the exception to jurisdiction of the court and demurrer be sustained, and complainant's bill dismissed with costs.

"Decree rendered March 20, 1877.

"Decree signed March 24, 1877."

It will thus be seen that the plea was not considered in the case, or if considered, the decree was not founded on it. Indeed, this could not be so without error. The proper mode of treating a plea is to set it down for hearing as to its sufficiency to meet the bill, or so much of the bill as it purports to cover. If found to be sufficient, the complainant has a right to reply to it by denying its allegations, or otherwise putting it in issue. See Equity Rules, 32, 33, and 34, prescribed by this court. So also by these rules the charge of a fraudulent combination to cheat the complainant required that the plea should have been accompanied by an answer denying the fraud under oath. The plea may, therefore, be considered as out of the case.

The demurrer may be held to include the exception as one of its grounds, and thus the case stands on bill and demurrer, and the sole question is whether, though there may be things

in the bill which, if specially demurred to, would be bad, it is a bill in which a court of equity could found relief.

As regards the claim to recover $20,000 damages we see no reason for going into equity. If such a recovery can be had at all it can be had as well at law. It is a proper case for a jury to determine whether there has been a combination to cheat and defraud plaintiff, and the amount he should recover for such fraud. It would seem, also, that to such a suit the Schexueyder Brothers, for whose benefit the fraud was committed, and who were its principal instigators, and whose actions were essential to its success, should be made parties. The charge is that they had assumed to pay the mortgage to Clapp, and had paid it, and then conspired with him to have the property, which was in their possession, and to which they had title, sold to defraud complainant out of his $14,000. However it may be at law, in chancery they are necessary parties to such a suit.

But the main purpose of this bill, perhaps its only real object, is to have the proceedings in the State court declared void.

That court had jurisdiction of the parties and of the subject-matter of the controversy. Complainant in this bill entered his appearance in that suit at a proper stage of it, to enable him to contest the right of Clapp to have the property sold. The debt for which it was to be sold was complainant's debt to Clapp.

The usual mode in the courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the rights of the parties are judicially determined by the court. Complainant appeared and obtained an order for such an injunction.

If this order was not obeyed it was for that court, not this, to give remedy. If the court below refused to do it, there was an appeal to the Supreme Court of the State. After the sale he could, by a motion to the court, have had it set aside; and that was the proper place for such a remedy.

The laws of Louisiana also provide a remedy by a special proceeding, to have a declaration of nullity of judgment in such cases as this in the court where the decree is entered.

There is no allegation that the plaintiff sought any of these remedies.

We think that for this court, after all this has been done, to undertake to decree that what that court did is void, to sit in review on its judgment, and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practised in the court, enable a party to retry in a Federal court any case decided against him in a State court.

We are not without precedent in such a case. In *Randall* v. *Howard* (2 Black, 585), the owner of lands encumbered by a mortgage made a friendly arrangement with the mortgagee, by which the latter was to foreclose the mortgage and buy them in, ostensibly for his own use, but with the understanding that he was to hold them for the use of the mortgagor as if no sale had been made. Regular proceedings were had in the State courts of Maryland, by which a decree of foreclosure and a sale were had, to all which the mortgagor made no defence. He afterwards filed his bill in chancery in the Circuit Court of the United States for the District of Maryland, charging that by reason of this agreement the mortgagee bought in the property for much less than its real value; that he now refuses to acknowledge any interest of complainant in the property, and is trying to sell it, whereby it may come into the hands of innocent purchasers for value; that all this is in violation of his agreement and a fraud upon complainant's rights, and in furtherance of this fraudulent and oppressive course he has ejected complainant from the premises by a process of the State court. He prays for an injunction to restrain the defendant from selling the property, for a sale of so much of the land as is necessary to pay the mortgage debt, and for a conveyance to complainant of the remainder, and for general relief. The bill was dismissed on demurrer.

The question whether that court had jurisdiction is answered in this language: "The bill in this case brings in review various matters passed on in the progress of the suit by the Cecil County Circuit Court, a court of general jurisdiction,

having complete control of the parties and of the subject-matter of the controversy.

"It seeks to annul a sale of lands made by virtue of a decree of the Cecil court, sitting as a court of equity, in a cause depending between the same parties; to effect the distribution of the proceeds of the sale, to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession, to invalidate his title, and to have the property resold.

"This is a direct and positive interference with the rightful authority of the State court. If there was error in the proceedings of the court a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted, and made the medium of consummating a wrong, then the court on petition or supplemental bill can prevent it."

These views, we think, dispose of the present case, and require an affirmance of the decree of the court below. It is

So ordered.

DURANT *v.* ESSEX COMPANY.

1. The Circuit Court, when its decree is affirmed and the mandate filed there, must record the order of this court and proceed with the execution of the decree.
2. For all the purposes of the case, a judgment of affirmance here by a divided court is as effectual as if all the judges had concurred therein.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. E. F. Hodges for the appellant.

The court declined to hear counsel for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case shows that on or about the 11th of October, 1847, the present appellant filed his bill in equity in the court below

against certain defendants for certain relief. After pleadings, proofs, and hearing, that court dismissed his bill absolutely. Appeal was thereupon taken in due form to this court. After one hearing, we ordered a reargument. Upon the reargument, the decree below was affirmed "by a divided court." When our mandate went down, the present appellant, in May, 1858, asked the Circuit Court that he might have leave to discontinue his suit, or if that could not be done, that his "bill might be dismissed without prejudice." All these several requests were refused, and the court simply ordered execution on the decree which had been affirmed.

Afterwards, the appellant filed a new bill in the Circuit Court to obtain the same relief as in the old suit, but setting up what he called new matter. To this bill the former decree was pleaded in bar, and the plea sustained by the Circuit Court, because the first bill had been dismissed absolutely. From that decree an appeal was taken to this court, and at the December Term, 1868, in *Durant* v. *Essex Company* (7 Wall. 107), we decided that the decree, absolute in its terms, dismissing the bill on the merits, was a final determination of the controversy, and constituted a bar to any further litigation of the same subject between the same parties.

Thereupon on the 29th of June, 1874, the appellant filed a petition in the Circuit Court setting up these facts and his newly discovered matter, and asked that the decree affirmed here in 1858, might "be revoked or so modified that his bill of complaint be dismissed without prejudice to his further proceeding at law or equity." This petition was denied, and to reverse that order the present appeal was taken.

Waiving all questions as to the right of appeal from such an order, we are clearly of the opinion that the Circuit Court could do no otherwise than it did. On a mandate from this court affirming a decree, the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the

power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The Circuit Court had no power after that to do what we might have done and did not do.

Decree affirmed.

SHAW v. RAILROAD COMPANY.

1. Statutes are not to be construed as altering the common law, or as making any innovation therein, further than their words import.
2. Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation.
3. The rule that a *bona fide* purchaser of a lost or stolen bill or note indorsed in blank or payable to bearer is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading.
4. The purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a *bona fide* purchaser, nor entitled to hold the merchandise covered by the bill against its true owner.
5. Where the judgment below was entered properly, this court will not remand the case for a new trial because of the verbal mistake of the clerk in using a superfluous word in entering the verdict. As the verdict was amendable in the court below, the amendment will be regarded as made.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of

Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft — the original bill of lading still being attached thereto — to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine, —

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from

which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Esrey thereupon sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Mr. James E. Gowen for the plaintiffs in error.

The original bill of lading was a negotiable instrument. By its indorsement, while the cotton was in transit to Miller & Brother for a valuable consideration, and without notice of any defect in the title of Kuhn & Brother, they acquired a valid title to the goods.

When the Merchants' National Bank of St. Louis took the bill of lading, Missouri was the place in which the contract was made, — the place in which the property was actually situated, — and it was the domicile of all the contracting parties. There can be no doubt, therefore, that the legal effect of the bill was, for the time being, at least determinable by the law of that State. *Scudder* v. *Union National Bank*, 91 U. S. 406; *Peninsular and Oriental Steamship Co.* v. *Shand*, 3 Moo. P. C. C. N. S. 272; *McDaniels* v. *Chicago & Northwestern Railway Co.*, 24 Iowa, 412; *First National Bank of Toledo* v. *Shaw*, 61 N. Y. 283; *Henry* v. *Philadelphia Warehouse Co.*, 81 Pa. St. 76; *Ory* v. *Winter*, 4 Mart. N. S. (La.) 277; *Slacum* v. *Pomery*, 6 Cranch, 221; *De la Chaumette* v. *Bank of England*, 2 Barn. & Adol. 385; *Trimbey* v. *Vignier*, 1 Bing. N. C. 151; *Lebee* v. *Tucker*, Law Rep. 3 Q. B. 77; *Robertson* v. *Burdekin*, 1 Ross, L. C. 559; Story, Confl. of Laws, sect. 263; Wharton, Confl. of Laws, sects. 452, 453, 454, 471.

The bill of lading in the hands of Miller & Brother, even if its effect were determinable by the law of Pennsylvania, would be a negotiable instrument. The statute of that State expressly enacts that warehouse receipts or bills of lading shall be negotiable. It is a familiar principle that technical words in a statute are to be taken in a technical sense, unless it appears that they were intended to be applied differently from

their ordinary or legal acceptation. *United States* v. *Jones*, 3 Wash. 209; *United States* v. *Wilson & Peters*, Baldw. 78; *McCool* v. *Smith*, 1 Black, 459.

"'Negotiable' and 'negotiability' signify that an instrument is capable of being transferred so as to be free from any questions between original parties, the quality of being vendible by commercial indorsement." Abbott's Law Dictionary.

It is necessary to inquire, then, whether there is any thing in the act which denotes an intent to use the word "negotiable" in its ordinary legal sense. An examination shows that the legislature had in view the ordinary meaning of the word. The act provides that bills of lading and warehouse receipts may be transferred by "indorsement and delivery," thus using a term applicable solely to the transfer of negotiable instruments. The proviso to the first section enacts that all warehouse receipts or bills of lading having the words "not negotiable" plainly written or stamped on the face thereof shall be exempt from the provisions of the act. The proviso would be unmeaning, if the object of the act was not to make bills of lading actually negotiable instead of merely assignable, since it must be presumed that "negotiable" is used in the same sense in the proviso as in the body of the section.

Moreover, it should not be assumed that the object in passing the act was to impart to bills of lading the quality of assignability when by the common law they already had that quality to the fullest extent.

In a number of the States, statutes were passed at an early period for the purpose of making promissory notes negotiable instruments. Many of them resembled the Missouri statute in the present case, in superadding the words "like bills of exchange." Thus the statute of New York provided that "all notes in writing . . . shall be negotiable in like manner as inland bills of exchange." But in many of the States all such words were omitted. Thus in Virginia the statute enacted that "every promissory note or check for money payable in this State at a particular bank . . . and every inland bill of exchange payable in this State shall be deemed negotiable." Code of Virginia (edition of 1860), p. 629. Yet certainly no one would contend that the omission of the words "like bills

of exchange" in some of these statutes rendered promissory notes negotiable in some other sense than bills of exchange were negotiable.

The fact that Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft does not invalidate their title, — *mala fides* on their part must be shown. *Goodman* v. *Simonds*, 20 How. 848; *Murray* v. *Lardner*, 2 Wall. 110. *Phelan* v. *Moss* (67 Pa. St. 59) holds that a *bona fide* holder for value of a negotiable note without notice can recover upon it, notwithstanding he took it under circumstances which ought to have excited the suspicions of a prudent man, and that, in order to destroy his title, his taking the note *mala fide* must be shown.

The court erred in entering a judgment upon the verdict which found, not the value of the goods which had been replevied, but the value of those which been eloigned. This was a palpable error, but at the same time it is not pretended that it was any thing but the consequence of an unnoticed mistake in entering the verdict. The difficulty, however, is that the record, as it now stands, shows a judgment relating not to the property in actual controversy, but to that with which the defendants had nothing to do. They therefore have a right to complain of the insufficiency of the record, in not showing their discharge from responsibility for the cotton which really formed the subject-matter of this suit.

Mr. Robert N. Willson and *Mr. George Junkin, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by

them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the endorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a

right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defence which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in

their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instrument in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, endorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of *mala fides* will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 343; *Murray* v. *Lardner*, 2 Wall. 110; *Matthews* v. *Poythress*, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (*Miller* v. *Race*, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in *Peacock* v. *Rhodes* (2 Doug. 633), to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, — a representative of those goods. But if the

goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has

most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in *Goodman* v. *Harvey*, *Goodman* v. *Simonds*, *Murray* v. *Lardner* (*supra*), and in *Phelan* v. *Moss* (67 Pa. St. 59), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

This disposes of the principal objections urged against the charge given to the jury. They are not sustained. The other assignments of error are of little importance. We cannot say there was no evidence in the case to justify a submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft. It does not appear that we have before us all the evidence that was given, but if we have, there is enough to warrant a submission of that question.

The exceptions to the admission of testimony, and to the cross-examination of Andrew H. Miller, are not of sufficient importance, even if they could be sustained, to justify our reversing the judgment. Nor are we convinced that they exhibit any error.

There was undoubtedly a mistake in entering the verdict. It

was a mistake of the clerk in using a superfluous word. The jury found a general verdict for the plaintiff. But they found the value of the goods "eloigned" to have been $7,015.97. The word "eloigned" was inadvertently used, and it might have been stricken out. It should have been, and it may be here. The judgment was entered properly. As the verdict was amendable in the court below, we will regard the amendment as made. It would be quite inadmissible to send the case back for another trial because of such a verbal mistake.

Judgment affirmed.

NATIONAL BANK v. CARPENTER.

1. Where it appears by the complainant's bill that the remedy is barred by lapse of time, or that by reason of his laches he is not entitled to relief, the defendant may by demurrer avail himself of the objection.
2. Under the rules of equity practice established by this court, the complainant is not entitled, as a matter of right, to amend his bill after a demurrer thereto has been sustained; but the court may, in its discretion, grant him leave to do so upon such terms as it shall deem reasonable.
3. The order refusing him such leave cannot be reviewed here, if the record does not show what amendment he desired to make.
4. *Wood* v. *Carpenter* (*supra*, p. 135) reaffirmed.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The facts are stated in the opinion of the court.

Mr. Andrew L. Robinson and *Mr. Asa Iglehart* for the appellant.

Mr. Charles Denby and *Mr. James Shackelford*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This suit was brought by the Mercantile National Bank of the City of Hartford against Willard Carpenter, John Love, and DeWitt C. Keller. The chief difference between it and *Wood* v. *Carpenter* (*supra*, p. 135) is that it is in equity, while that was an action at law. The bill sets out the same facts in the same way as the declaration, except that the latter alleges a fraudulent purchase by Keller of a judgment in favor of Wood

against Carpenter, while the bill alleges such a purchase of a judgment in favor of the complainant against him and John Love. The defendants severally demurred. The demurrers were sustained, and the complainant asked leave to amend. Leave was refused and the bill dismissed. The complainant thereupon appealed to this court.

Our reasoning in the case at law and the authorities there cited are applicable here. It appears on the face of the bill that the case which it makes is barred by the Statute of Limitations, and that the excuse of concealment of "the cause of action" by the defendants is not so alleged as to avail the complainant. This defect can be taken advantage of by demurrer. *Rhode Island* v. *Massachusetts*, 15 Pet. 233; *Maxwell* v. *Kennedy*, 8 How. 210. The objection of laches is also fatally apparent. *Brown* v. *County of Buena Vista*, 95 U. S. 157; *Duncan* v. *Lyon*, 3 Johns. (N. Y.) Ch. 351. The demurrers of the defendants were, therefore, rightly sustained, and the bill was properly dismissed.

It is insisted that the complainant was entitled of right to amend under the 29th of the rules of equity practice established by this court, and that the learned judge below erred in refusing the leave asked for. That rule has no application and does not affect the case. It applies only where leave is asked before a demurrer is allowed. Formerly, upon the allowance of a demurrer to a whole bill, the bill was out of court, and no subsequent proceeding could be taken in the cause. 1 Daniel, Ch. Pr. 597; 1 Barb. Ch. Pr. 111. The rigor of this principle was subsequently relaxed. It is unnecessary to pursue the subject further, because the practice in such a state of things in the courts of the United States is regulated by the 35th rule of equity practice, which is as follows:—

"If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable."

In this case it does not appear what amendment or amendments the appellant desired to make, nor that the court below in any wise abused the discretion with which it was clothed. Error must be shown affirmatively. It cannot be presumed.

Decree affirmed.

UNITED STATES v. DAWSON.

The finding of the Circuit Court upon a question of fact cannot be reviewed on a writ of error.

ERROR to the Circuit Court of the United States for the District of Maryland.

The Attorney-General for the plaintiff in error.
Mr. Joseph H. Bradley, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an action on the bond of a collector of internal revenue. After the suit was brought, amicable continuances were granted, and then several statements of account were made by the auditing officer of the government. The last of these stated a balance against the collector of $2,115.25, which was paid by his executors before final trial. The only question raised in the court below and sought to be presented here is the date from which interest should be awarded on that sum.

The counsel for the government cite section 3624 of the Revised Statutes, which provides that where any person accountable for public money neglects or refuses to pay the sum or balance found due to the United States upon adjustment by the proper officer, he shall forfeit his commissions and pay interest at six per cent per annum from *the time of receiving the money.*

There is no question here of the construction of the statute, but whether the balance finally found due the government was for money received by him or for something else. The case was submitted to the court without a jury, and the finding of facts by the court is part of the record.

From this it appears that about the time the collector went out of the office he paid a large sum of money, which he supposed to be all that he owed the government. But he stood charged on the books of the department with a large sum for uncollected taxes. It was the adjustment of this account which occupied the three years in which the suit was pending.

The court finds that the final balance of $2,115.25 was made up of these uncollected taxes, for which he was still responsible, and was not for any money actually received by the collector.

Counsel for the government argue against this conclusion. But whether sound or not, it was a question of fact on which the finding of that court cannot be reversed here; and its judgment is accordingly

Affirmed.

BUTTERFIELD v. SMITH.

An executor charged himself in the inventory of the estate of the testator with a note payable to the latter and secured by mortgage. His accounts were settled on that basis. An administrator with the will annexed subsequently brought suit to foreclose the mortgage. *Held*, 1. That the probate record showing the inventory and the order for distributing the assets of the testator is not conclusive evidence that the note has been paid. 2. That an executor's settlement when adjudicated binds only the parties thereto.

APPEAL from the Circuit Court of the United States for the District of Kansas.

This suit was brought, Oct. 26, 1877, by Mary A. Smith, administratrix *de bonis non*, with the will annexed, of the estate of Julius C. Wright, deceased, to foreclose a mortgage made by Daniel M. Adams and wife to secure a note for $5,000 to said Wright. The latter died in 1874. His will, by which he appointed George B. Wright his executor, was admitted to probate, and the executor qualified. In an inventory of the estate this note was included as part of the assets. In April, 1875, the executor made application to the court for a final settlement. In his accounts he charged himself with the full amount of the inventory, and after the allowance of the proper credits, a balance was found in his hands which was ordered to be distributed in a specified manner, according to the terms of the will, but a balance of $6,840.25, one share, was left in his hands with directions "to invest for Charles Wright, or pay the money pursuant to the will." The executor died in 1877. The complainant, shortly after her appointment

as such administratrix, commenced this suit, to which Adams and wife, and Oscar H. and Andrew J. Butterfield, with others, were made defendants. Adams and wife did not answer, but as to them the bill was taken as confessed. The Butterfields answered that they were the owners of the mortgaged property, and then, by way of defence to the mortgage, set up — 1, that they were informed and believed that the note and mortgage sued on were not the property of the estate of Julius C. Wright, but that the same were the property of Adams, the mortgagor, and were executed by him for the purpose of cheating and defrauding his creditors, and especially the appellants; and, 2, that the note sued on had been paid to George P. Wright, executor, "as appears by the inventory and his final settlement, copies of which are hereto attached, marked exhibits A and B." A decree was passed in favor of the complainant. The Butterfields then appealed to this court.

Mr. Alfred Ennis and *Mr. C. A. Sperry* for the appellants.

The settlement of the executor has the force and effect of a judgment. The only duty of the appellee was to see that the money was properly distributed pursuant to the order entered by the court when the settlement was made. The assets, including the note and mortgage in controversy, had been previously and fully administered. *Brown* v. *Brown*, 53 Barb. (N. Y.) 217; *Campbell* v. *Thacher*, 54 id. 382; *State* v. *Stephenson*, 12 Mo. 182; *Picot* v. *Biddle*, 35 id. 29; *Williams, Adm'r*, v. *Petticrew*, 62 id. 461; *Sheets et al.* v. *Kirtley*, id. 417; *Tate* v. *Norton*, 94 U. S. 746; *Musick* v. *Beebe*, 17 Kan. 47; *Singleton* v. *Garrett*, 23 Miss. 196; *Lambeth* v. *Elder*, 44 id. 81.

Mr. G. C. Clemens, contra.

MR CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

No proof was put in on either side. The first defence, therefore, was clearly not sustained. Adams, the mortgagor, by not answering the bill, admitted the validity of the note, and the executor of the mortgagee, by charging himself with the note as part of the assets and settling his accounts on that basis, showed that he supposed the debt to be a valid one in the hands of the testator.

As to the second defence, it is claimed that the probate records attached as exhibits to the answer, showing the inventory and distribution, are conclusive evidence that the debt has been paid. Undoubtedly, final settlements of administrators and executors, when adjudicated, have the force and effect of judgments as between the parties to such settlements; but neither Adams nor these appellants were parties to this settlement, which concluded the executor and distributees, but no one else. Nothing is more common than for an executor or an administrator to charge himself with debts due the estate before they are collected, and thus expedite a final settlement. It would be dangerous to hold that, as between the executor or administrator and the debtor, such a settlement was conclusive evidence of the actual payment of the debt and the discharge of the debtor. The question presented by the answer is not whether the estate now owns the note secured by the mortgage, if it be still unpaid, but whether it has been paid.

Decree affirmed.

COWDREY v. VANDENBURGH.

1. Except where the original owner of a non-negotiable demand which he has indorsed in blank is estopped from asserting his original claim thereto, the purchaser thereof from any party other than such owner takes only such rights as the latter has parted with.
2. *Semble*, that if the pledgee of such a demand writes a formal assignment to himself over the blank indorsement made by the pledgor, and in that form sells it to a third party for value, the pledgor is, as against such third party, estopped from asserting ownership thereto.

APPEAL from the Supreme Court of the District of Columbia.

This was a bill in equity, filed by J. W. V. Vandenburgh, H. L. Crawford, and L. S. Filbert, trading as J. W. V. Vandenburgh & Co., against Rudolph Blumenburgh, to compel the surrender of a certain certificate, of which the following is a copy: —

"No. 4441.] OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
"WASHINGTON, D. C., Dec. 6, 1873.

"I hereby certify that I have this day audited and allowed the account of J. V. W. Vandenburgh & Co., for work on Columbia Street, amounting to eight thousand four hundred and fifty-one dollars and eighty-eight cents.

"$8,451.88.

"J. C. LAY, *Auditor.*"

N. A. Cowdrey was subsequently made a party. A decree was rendered against him, from which he appealed to this court.

The remaining facts are stated in the opinion of the court.

Mr. Joseph H. Bradley for the appellant.

Mr. James G. Payne, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

The complainants, composing the firm of Vandenburgh & Co., of the District of Columbia, had, previously to Dec. 6, 1863, entered into contracts with the Board of Public Works of the District for grading, paving, and improving certain streets in the city of Washington. On that day, their account, amounting to $8,451.88, for work on one of the streets, was audited and allowed, and a certificate of the auditor to that effect was issued to them. On the 17th of February following the complainants borrowed of the defendant Blumenburgh the sum of $3,160 for six months, and deposited with him as collateral security the certificate, to be returned upon the payment of the money. The certificate was at this time indorsed by them in blank. When the money became due they called with the amount and accrued interest at the former place of business of Blumenburgh to pay the debt and take up their certificate; but he had disappeared, and no one there knew when he had left or whither he had gone. The complainants could not find him, nor any one representing or acting for him; and, what was of more consequence, they could not find their certificate either. He had clandestinely departed from the city; and they charge in their bill, in substance, that he always intended to cheat and defraud them; and that without their knowledge he has disposed of the certificate to some one, who in conjunction

with him is attempting to wrongfully use it, and thus deprive them of their property.

By the legislation of Congress relating to the District of Columbia, certificates of allowed and audited accounts, like that in question, could be surrendered to a board of audit, and certificates of indebtedness against the District received for them; and these latter certificates could be exchanged for interest-bearing bonds of the District. The complainants, informed that the certificate belonging to them had been presented to the board of audit by agents of Blumenburgh, or of persons to whom it had been passed, for the purpose either of obtaining money therefor or bonds of the District, filed the present bill to arrest the further use of the certificate, and compel its restitution to them. Learning afterwards that the appellant, N. A. Cowdrey, of New York, claimed to be owner of the certificate, and was seeking to obtain for it from the board of audit a certificate of the indebtedness of the District, for which an interest-bearing bond could be issued, they amended their bill, and brought him in as a defendant.

In his answer he admits the possession of the certificate, and avers, in substance, that he purchased it in the ordinary course of business of a broker in Washington for value with other certificates of a similar character, but does not state what amount he paid for it; that he was at the time ignorant of the transaction between complainants and Blumenburgh stated in the bill, and that the certificate had the blank indorsement of the complainants, which justified him in concluding that they had parted with their interest; and he insists that he is therefore entitled to protection as a *bona fide* holder for value without notice. To the answer a replication was filed, and its affirmative allegations are unsupported by any proofs. The answer cannot, therefore, be taken as evidence on his behalf. He must, therefore, be treated as one standing in the place of Blumenburg, and holding the certificate subject to the claim and equities of the original holder. The certificate was not a negotiable instrument which could pass by indorsement and delivery. It was not a promise to pay any sum, nor was it an order upon any one or upon any fund for the payment of money, or for the delivery of any thing of value. It was simply a statement that

the account of the complainants for work done by them upon one of the streets of Washington had been audited and allowed by an officer of the city, whose duty it was to ascertain and certify as to the amount and price of the work done by a contractor. Whoever takes such a certificate, whether with or without notice, takes it subject to all the rights and equities of the actual owner, as much so as if it were tangible property in the streets.

The cases where by law certificates of a similar character are made negotiable can have no application. It is not pretended that any law of Congress has made the certificates of the auditors of the District of Columbia negotiable, or given to them any special character beyond that which they purport on their face to possess. Nor can any weight be given to the suggestion that, by custom, these instruments are considered and treated as negotiable paper in the District. There was no evidence offered of the existence of any such custom, even had such evidence been admissible to contravene an established rule of law.

That the purchasers of non-negotiable demands, like the certificate here, from others than the original owner of them, can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim, is established by all the authorities. He must in such case, as Lord Thurlow said, abide by the case of the person from whom he buys. *Cutts* v. *Guild*, 57 N. Y. 229; *Ingraham et al.* v. *Disborough*, 47 id. 421; *Bush* v. *Lathrop*, 22 id. 535.

If the pledgee, Blumenburgh, had written over the blank indorsement of the complainants a formal assignment to himself of the claim, and in that form had sold the certificate to Cowdrey for value, it is possible that the latter might have successfully insisted that the complainants were estopped from asserting, as against him, ownership of the claim. The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. The case of *McNeil* v. *The Tenth National Bank*, in the Court of Appeals of New York, contains a clear statement of the law on this head. There, it is true, a certificate

of stock was pledged with a blank assignment and power of attorney indorsed, which the pledgee afterwards filled up, and then disposed of the stock. It was evident that the owner contemplated that the blanks in the assignment and power should be filled up, if it should ever become necessary. 46 N. Y. 325.

But the principle stated by the court is as applicable where no such intention is manifested. The rights of innocent third parties, as the court there observes, "do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Here the complainants could have expressed in their indorsement the purpose of the deposit of the certificate with Blumenburgh, — that it was as security for a specified sum of money, — and thus imparted notice to all subsequent purchasers or assignees that the pledgee held only a qualified interest in the claim. But having indorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signature. Had it, therefore, appeared in this case that Cowdrey paid any money for the certificate, and took it with the assignment which he himself afterwards wrote over the signature of the complainants, we are inclined to think that his defence would have been sustainable. But as he has not shown that he parted with any value for the claim, and no assignment was at the time indorsed over the blank signature, he must be treated as standing in the shoes of his alleged vendor, Blumenburgh.

Decree affirmed.

MR. JUSTICE SWAYNE dissented.

WALDEN v. SKINNER.

1. Where, as in this case, the evidence exhibited in the record shows that the purchase of land was made upon certain trusts which through mistake the trustee failed to have properly declared in the deed, the *cestui que trust* is entitled to a decree directing the deed to be reformed.
2. The jurisdiction of the Circuit Court is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same State as the complainant, to perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the State.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The facts are stated in the opinion of the court.

Mr. Benjamin H. Hill for the appellant.

Mr. A. R. Lawton, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Trusts are either express or implied, the former being such as are raised or created by the act of the parties, and the latter being such as are raised or created by presumption or construction of law. *Cook* v. *Fountain*, 3 Swanst. 585, 592.

Implied trusts may also be divided into two general classes: First, those that rest upon the presumed intention of the parties. Secondly, those which are independent of any such express intentions, and are forced upon the conscience of the party by operation of law. 2 Story, Eq. Jur., sect. 1195.

Sufficient appears to show that Sarah S. Walden, the complainant, on the sixth day of May, 1874, filed her bill of complaint in the court below against the respondents, to wit, Darius S. Skinner and John N. Lewis and Charles S. Hardee, executors of Charles S. Henry, deceased, who in his lifetime was the trustee of Penelope W. Tefft and her three children. Preliminary to the charging part of her complaint she alleges and states that on the 28th of October, 1847, she intermarried with William P. Tefft, who on the 9th of August, five years later, departed this life intestate and without children, leaving the complainant as his sole heir and legal representative; that on the 4th of June, six years subsequent to the death of her first husband, she inter-

married with Charles C. Walden, who, on the eighth day of December of the next year, departed this life testate, leaving no children by the complainant, and that he by his will bequeathed to her all the property and rights owned and possessed by her at the date of their marriage; and that the father of her first husband died intestate on the 30th of June, 1862, but that no administration was ever had upon his estate, and that his widow, the mother of her first husband, departed this life testate on the 11th of September eleven years later; that her first husband had two brothers at the date of her marriage neither of whom ever married and both of whom died without children, that at the death of the elder of the two he had a life policy of insurance for $5,000, which his administrator collected and paid to his two living brothers.

Allegations then follow in the bill of complaint which relate more immediately to the subject-matter of the controversy, from which it appears that Elias Fort, June 28, 1831, conveyed a certain tract of land to Charles S. Henry and Stephen C. Greene, as trustees and in trust for Penelope W. Tefft and her three sons, William P. Tefft, Henry D. Tefft, and Charles E. Tefft, and it is therein declared that the said property is for the use of the mother during her lifetime and the three sons, and that after the death of the mother it shall be for the use of the three sons alone as tenants in common, and that in case of sale "the proceeds to be reinvested upon the same uses and trusts as aforesaid, and if not sold, then the property, after the death of the mother, was to be distributed by said trustees to each of the said sons as shall survive and attain the age of twenty-one years."

Greene, one of the trustees, subsequently died, leaving Charles S. Henry the sole surviving trustee under the trust-deed, and she charges that on the 19th of July, 1848, the mayor and aldermen of the city of Savannah conveyed to him as such trustee a certain lot of land numbered five, Monterey Ward, in said city, the lot being then subject to certain annual ground-rents, as specified in the conveyance, and the complainant avers that the conveyance is informal and incomplete, inasmuch as the trustee never signed it, as it was intended, and that it fails to set forth and express the trust interests of the three children

as it should do. Wherefore she alleges that it should be reformed and be made to conform to the purposes of the trust as created and set forth in the original trust-deed.

Persuasive and convincing reasons in support of that request are alleged which will hereafter be reproduced when the merits of the controversy are considered.

Relief specific and general is prayed, as is more fully set forth in the transcript. Process was served and the respondents appeared, and after certain interlocutory proceedings filed separate answers.

All of the defences to the merits are set up in the answer of the first named respondent, who admits all of the preliminary matters alleged in the bill of complaint. He also admits that there was in existence at the time of the first marriage of the complainant the trust estate held by the surviving trustee arising under the conveyance from Elias Fort to the said two trustees, which, as he alleges, was held for the sole and separate use of the mother during her life, and remainder at her death to her three sons as tenants in common.

Prior to that transaction there is no controversy between the parties as to the facts, and he also admits that the authorities of the city conveyed the lot called Monterey Ward to the surviving trustee, but he alleges that by the terms of the conveyance the legal title to the lot vested in the trustee in trust for the sole and separate use of the mother, the trust being executory only so long and for such time as the *cestui que trust* should remain a *feme covert;* and he denies that the conveyance is informal and incomplete in any particular, or that it was ever expected or intended by any one that the trustee should sign the same, and he avers that it was accepted by the trustee for the purposes therein set forth.

Attempt is also made to enforce that view by a specific denial of most of the reasons assigned in the bill of complaint in support of the request that the conveyance to the trustee of the lot called Monterey Ward may be reformed so as to conform to the trusts created and expressed in the antecedent trust-deed.

Both of the other respondents allege that they are citizens of the State where the suit is brought, and deny that the Circuit

Court had any jurisdiction to make or execute any order, judgment, or decree against them in the premises.

Proofs were taken, the parties heard, and the Circuit Court entered a decree in favor of the respondents, dismissing the bill of complaint. Prompt appeal was taken by the complainant to this court, and since the appeal was brought up she has filed the assignment of errors set forth in the brief of her counsel. They are ten in number, all of which will be sufficiently considered in the course of the opinion, without giving each a separate examination.

Before examining the questions presented in respect to the second deed, it becomes necessary to ascertain the true construction and meaning of the original trust-deed so far as respects the second trust therein created and defined. Eight hundred dollars constituted the consideration of the conveyance, and it was made upon the trust that if, during the lifetime of the mother of the three sons, it should be deemed advisable by her to sell and convey the premises, then upon this further trust that the trustees as aforesaid, or the survivor of them, upon her application and with her consent, signified by her being a party to the conveyance, will sell and convey the lot and improvements for the best price which can be obtained for the same, to any person or persons whatsoever, without applying to a court of law or equity for that purpose to authorize the same, and the proceeds thereof upon the same trusts as aforesaid to invest in such other property or manner as the mother of the sons shall direct and request for the same use, benefit, and behalf.

Explicit and unambiguous as that provision is, it requires no discussion to ascertain its meaning; nor is it necessary to enter into any examination of the third trust specified in the conveyance, as it is conceded that the trust property was sold by the surviving trustee for reinvestment during the lifetime of the mother at her request, she joining in the conveyance as required by the terms of the instrument creating the trust.

Twenty-four hundred dollars were received for the conveyance of the trust property, and all of that sum, except $600 turned over to the mother, was invested in buildings then being erected upon lot numbered five, called the Monterey Ward.

Purchase of that lot had previously been made by the surviving trustee named in the original trust-deed, and it appears that the parties understood that it was to be upon the same uses and trusts as were contained in the trust-deed by which the title to the lot sold was acquired.

Proof that the new lot numbered five, called Monterey Ward, was purchased by the father and the three sons during the lifetime of the father seems to be entirely satisfactory, and it is equally well established that each contributed one-fourth part of the sum of $240 paid for the purchase-money of the lot. Satisfactory proof is also exhibited that Henry D. Tefft, one of the three brothers, died Aug. 13, 1849, unmarried and intestate, and that he had a valid subsisting insurance upon his life in the sum of $5,000, which his administrator collected and paid to his surviving brothers.

Eighteen hundred dollars of the proceeds arising from the sale of the property acquired by virtue of the first trust-deed were appropriated towards erecting buildings on the new lot purchased by the father and the three sons while in full life, and when the one whose life was insured deceased, the two survivors appropriated each his proportion of the money received to the same purpose, with the understanding that the property was subject to the same uses and trusts as the property previously acquired and sold.

Competent proofs of a convincing character are also exhibited in the transcript that the first husband of the complainant contributed other sums towards completing the buildings, leaving no doubt that he paid his full proportion for the improvements as well as for the lot purchased of the city authorities.

Enough appears to show that the buildings were completed more than two years before the first husband of the complainant died intestate and without children, when it is obvious that she became the sole heir to all the interest he possessed in the said estate, whatever it might be. Two years elapsed after the buildings were completed before the father of the three sons died, and the proofs show that during that period the complainant resided with the parents of her husband, and that her rights as his heir-at-law were uniformly recognized by the family; that she continued to reside there with her mother-in-law after

the death of the senior Tefft, until the decease of his widow, and that throughout that period she paid one-half of all repairs, taxes, insurance, and other expenses of the property as if she were equally interested in the same with her mother-in-law, and was liable to bear an equal proportion of all such expenses.

Opposed to that is the proof that the mother-in-law, one year before her death, when in a low and depressed frame of mind, bequeathed the whole of the lot in question to the first-named respondent, who is her nephew, and on the same day executed a deed to him of the entire property, to take effect in possession after her death. Sole title to the premises in fee-simple is claimed by the respondent under those instruments, and he brought ejectment against the complainant to dispossess her of the premises, and it appears that she was at great disadvantage in attempting to defend the suit, because the trustee had omitted to see that the title was conveyed in trust for the benefit of the *cestuis que trust* as in the prior trust deed, as he should have done, to carry into effect the understanding of all the parties to the sale of the prior trust premises and the purchase of the lot in question. What she alleges is that the purchase of the new lot was made for the same *cestuis que trust* as those described in the deed of the old lot, and that the understanding of all was that the deed of the new lot should contain and declare the same uses and trusts in favor of the same persons, and the proofs to that effect are full and entirely satisfactory.

Support to that view is also derived from the fact that the surviving trustee in the old deed is the grantee in the new deed, and that he is therein more than once described as trustee, and in the introductory part of the instrument is denominated trustee of Mrs. Penelope W. Tefft, wife of Israel K. Tefft, of the city and State previously mentioned in the same instrument.

Ten years before the suit was instituted the trustee in the new deed departed this life, and the other two respondents were appointed and qualified as his executors. Unable to obtain complete redress at law, the complainant prays that the deed of conveyance from the city of the lot and improvements in question may be reformed and be made to conform to the true intent and purpose for which the lot was purchased, and to

that end that it may be made to include the same uses and trusts raised, created, and declared in the prior deed from Elias Fort, according to the understanding and agreement of all the parties.

Besides that she also prays that her equities in and to the property, including the improvements, may be set forth, decreed, and allowed by the court, including such as are in her favor from the payment of taxes, insurance, and repairs upon the property during the lifetime and since the death of her mother-in-law, and that the first-named respondent may be enjoined from further proceeding in his ejectment suit to recover possession of the premises.

Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, Judge Story says, the reasons for granting relief seem to be equally satisfactory. 1 Story, Eq. Jur., sect. 156.

Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfil or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement, the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the

terms of it and the manifest intention of the parties. *Hunt* v. *Rousmaniere's Adm'rs*, 1 Pet. 1, 13; *Same* v. *Same*, 8 Wheat. 174, 211.

Even a judgment when confessed, if the agreement was made under a clear mistake, will be set aside if application be made, and the mistake shown while the judgment is within the power of the court. Such an agreement, even when made a rule of court, will not be enforced if made under a mistake, if seasonable application be made to set it aside, and if the judgment be no longer in the power of the court, relief, says Mr. Chief Justice Marshall, may be obtained in a court of chancery. *The Hiram*, 1 Wheat. 440, 444.

Equitable rules of the kind are applicable to sealed instruments, as well as to ordinary written agreements, the rule being that if by mistake a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the antecedent agreement. So if a deed be ambiguously expressed in such a manner that it is difficult to give it a construction, the agreement may be referred to as an aid in expounding such an ambiguity; but if the deed is so expressed that a reasonable construction may be given to it, and when so given it does not *plainly* appear to be at variance with the agreement, then the latter is not to be regarded in the construction of the former. *Hogan* v. *Insurance Co.*, 1 Wash. 419, 422.

Rules of decision in suits for specific performance are necessarily affected by considerations peculiar to the nature of the right sought to be enforced and the remedy employed to accomplish the object. Where no question of fraud or mistake is involved, the rule with respect to the admission of parol evidence to vary a written contract is the same in courts of equity as in those of common law, the rule in both being that when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations. Proof of fraud or mistake, however, may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made

different by addition or subtraction from what they were intended and believed to be when the same was executed.

Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Even at law, all that pertains to the execution of a written instrument or to the proof that the instrument was adopted or ratified by the parties as their act or contract, is necessarily left to extrinsic evidence, and witnesses may consequently be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was procured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. *Thoroughgood's Case*, 4 Coke, 4.

When the deed or other written instrument is duly executed and delivered, the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol; but courts of equity, says Chancellor Kent, have a broader jurisdiction and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. Pursuant to that rule, he held it to be established that relief can be had against any deed or contract in writing founded on mistake or fraud, and that mistake may be shown by parol proof and the relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defence. *Gillespie* v. *Moon*, 2 Johns. (N. Y.) Ch. 585, 596.

Parol proof, said the same learned magistrate, is admissible in equity to correct a mistake in a written contract in favor of the complainant seeking a specific performance, especially where the contract in the first instance is imperfect without referring to extrinsic facts. *Keisselbrack* v. *Livingston*, 4 id. 144; *Cathcart* v. *Robinson*, 5 Pet. 264.

Many cases support that proposition without qualification, and all or nearly all agree that it is correct where it is invoked

as defence to a suit to enforce specific performance. Little or no disagreement is found in the adjudged cases to that extent, but there are many others where it is held that the rule is unsound when applied in behalf of a complainant seeking to enforce a specific performance of a contract with variations from the written instrument. Difficulty, it must be admitted, would arise in any attempt to reconcile the decided cases in that regard, but it is not necessary to enter that field of contest and conflict in the case before the court for several reasons: 1. Because by comparing the original trust deed with the deed of the lot in question, in view of the attendant circumstances, the inference is very cogent that the second was designed and intended as a complete substitute for the first. 2. Because the proof shows to a demonstration that the consideration for the purchase of the second lot was paid in equal proportions by the father and each of the three sons. 3. Because it appears that the expensive improvements made upon the lot in question were made from the moneys of each of the three sons, advanced at the request of the father. 4. Because it appears that the family and every member of it understood from the first and throughout that the trustee held the property in trust for the mother and the three sons. 5. Because the father, from the date of the deed to the time of his death, recognized the premises as acquired and held for the benefit of his wife and their three sons. 6. Because the mother of the three sons, after the decease of the first husband of complainant, recognized her as interested in the property, and continued to do so at all times throughout her life until about the time she conveyed the lot in question to the respondent.

Both the deed and her will bear date Sept. 28, 1872, and the proofs show that she was at the time in a low, depressed state of mind, and that she departed this life within one year subsequent to the execution of those instruments. Prior to that, and throughout the whole period subsequent to the death of her husband, the proofs show that she uniformly recognized the complainant as the owner of a moiety of the lot and the improvements, and always required her to pay one-half of all repairs, taxes, insurance, and other expenses of the property.

By the terms of the original deed the property was conveyed

to the trustees, subject to the payment of taxes, assessments, and ground-rent, to and for the sole and separate use, benefit, and behoof of the mother and her three sons during her lifetime, and after her death to the three sons as tenants in common in equal parts, with the provision that if the mother during her lifetime should deem it advisable she might sell and convey the premises, and that in that event the further trust was raised and created that the trustees or the survivor of them, upon her application and with her consent signified by becoming a party to the conveyance, might sell and convey the lot and improvements for the best price which could be obtained for the same, without any application to a court of law or equity for that purpose, and to invest the proceeds thereof upon the same trusts in such other property or manner as the mother should direct, and for the same use, benefit, and behalf.

Provision was also made that if no such sale and re-investment was made during the lifetime of the mother, then the trustees were to sell the same for the sole use and benefit of the three sons or the survivor or survivors of them, share and share alike, until the youngest should arrive at the age of twenty-one years, when the trustees might sell and convey the same at the request of such survivor or survivors, and divide the proceeds to the survivor or survivors, share and share alike.

Taken as a whole the proofs show to the entire satisfaction of the court that the lot in question was purchased and conveyed to the surviving trustee upon the same trusts as those raised and created in the first deed, and that the trustee, through mistake, failed to have those trusts properly declared in the deed of trust to him as he should have done, and that the prayer of the bill of complainant, that the deed of the lot and improvements in question ought to be reformed and the rights of the complainant be ascertained and adjudged as if the deed in question contained the same trusts as those raised and created in the original trust deed is reasonable and proper and should be granted.

Courts of equity, beyond all doubt, possess the power to grant such relief, and the proofs, in the judgment of the court, are such as to entitled the complainant to such a decree, unless

the remaining defence set up by the respondent must prevail. *Cooper* v. *Phibbs*, Law Rep. 2 Ch. Ap. 149, 186; *Cochrane* v. *Willis*, 34 Beav. 359, 366. Such a decree, of course, cannot now be made against the trustee, as he is not living; but the executors, as contended by the complainant, are competent to perform that duty, and she prays that the decree may be adapted to the present state of the parties.

Suppose all that is true, still it is contended by the principal respondent that the decree below is correct, because the claim is barred. Much discussion of that defence will not be necessary, beyond what is required to ascertain the facts.

When the father died, the complainant was living on the premises, and she continued to reside there most or all the time during the widowhood of the mother of her first husband, except while she lived with her second husband, and when he died she returned to live with her mother-in-law. During all that time the proofs show that she was constantly recognized as the lawful heir to the estate of her deceased husband, until about a year before the decease of the mother, who also resided on the premises. Prior to that, the rights of the complainant were unmistakably recognized, and nothing of consequence had occurred to indicate any intent to call her just right in question. Soon after that, however, the respondent commenced an action of ejectment against her to recover possession of the entire lot and improvements, she still being in possession, and doubtless hoping and expecting that her rights would yet be acknowledged without the necessity of expensive litigation. Expectations of the kind not being realized, she filed the present bill of complaint. Laches are imputed to her; but the court, in view of the circumstances and of the embarrassments growing out of the obvious defects in the conveyance intended to secure her rights, is of the opinion that the evidence of laches is not sufficient to bar her right to recover in the present suit. Without more, these remarks are sufficient to show that the defence cannot be sustained, and it is accordingly overruled.

Two or three remarks will be sufficient to show that the objection that the Circuit Court has no jurisdiction to enter the required decree against the executors of the deceased trustee cannot be sustained. Jurisdiction as between the complainant

and respondent is unquestionable; and, if so, it is clear that the fact that the trustee if living was a citizen of the same State with the complainant would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant. Where that is so, the executor, in case of the decease of the trustee, if authorized by the law of the State to execute such a conveyance, may also be joined in the suit under like circumstances merely to accomplish the like purpose. Where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists. *McNutt* v. *Bland*, 2 How. 9, 15; *Browne* v. *Strode*, 5 Cranch, 303; *Coal Company* v. *Blatchford*, 11 Wall. 172, 177.

Cases arise in the Federal courts in which nominal or even immaterial parties are joined, on the one side or the other, with those who have the requisite citizenship to give the court jurisdiction in the case; and where that is so, the rule is settled that the mere fact that one or more of such parties reside in the same State with one of the actual parties to the controversy will not defeat the jurisdiction of the court. Decisive authority for that proposition is found in a recent ruling of Mr. Justice Miller, in which he states to the effect that mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States. *Arapahoe County* v. *Kansas Pacific Railway Co.*, 4 Dill. 277, 283.

Nothing is claimed of the executors in this case except that they shall perform the ministerial act of conveying the title, in case the power to do so is vested in them by the law of the State, and the court shall enter a decree against the principal respondent to that effect. From all which it follows that the complainant is entitled as between herself and the principal respondent to the relief prayed in the bill of complaint; but

the court, in view of all the circumstances, will not proceed to determine either the proportion of the trust property which belongs to the complainant or the amount she is entitled to recover of the said respondent. Instead of that, those matters are left to be ascertained and determined by the Circuit Court, with authority, if need be, to refer the cause to a master to report the facts, with his opinion thereon, subject to the confirmation of the Circuit Court.

Executors of the trustee, in such a case as the complainant alleges, are under the law of the State the successors of the deceased trustee, and that as such they may execute whatever remains executory in the trust at the time of his decease; from which it would follow, if that be so, that it will be the duty of the executors of the deceased trustee in this case, when the rights of the complainant are fully ascertained, to make the necessary conveyance to perfect her title to the same extent as the trustee might do if in full life. Express authority is reserved to the Circuit Court to ascertain the rights of the complainant as if the trust-deed was reformed, and to make the necessary decree to perfect her title in such mode and form as the law of the State and the practice of the State courts authorize and provide. *Crafton* v. *Beal*, 1 Ga. 322; *Brown* v. *Tucker*, 47 id. 485.

Costs in this court will be taxed to the principal respondent in favor of the complainant, but no costs will be allowed against the other two respondents.

Decree will be reversed and the cause remanded for further proceedings in conformity with the opinion of the court.

So ordered.

HOLLINGSWORTH v. FLINT.

In an action of trespass to try the title to lands in Texas, the plaintiff put in evidence a grant of them to A., as shown by certified copies of papers from the general land-office of that State. He then offered a deed from A. to B. for other and different lands, and one from C. and wife, the latter being the only heir-at-law of A., reciting that there was a misdescription in A.'s deed, and releasing, alienating, and conveying to B. the lands in the declaration mentioned. The acknowledgment of the deed of C. and wife required by the laws of that State to pass the estate of a married woman was not made until after the commencement of the suit. The plaintiff also offered a deed to him from the heirs-at-law of B. for all the lands belonging to the latter at the time of his decease or to which he was then entitled, but did not propose to show that B. had any title to the lands other than that shown by the other deeds. The deeds were excluded, and the jury instructed to find for the defendants. *Held*, that the action of the court was proper.

ERROR to the Circuit Court of the United States for the Western District of Texas.

This was an action of trespass to try the title to certain lands in Texas, brought by Thomas J. Hollingsworth against John T. Flint and D. T. Chamberlain. Flint filed a disclaimer of title. Chamberlain also filed a disclaimer as to several tracts embraced in the eleven leagues sued for, and as to the remainder pleaded not guilty and the Statute of Limitations. The jury found a verdict for the defendants, and judgment having been rendered thereon, Hollingsworth sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Mr. Philip Phillips, *Mr. Bethel Coopwood*, and *Mr. W. Hallett Phillips* for the plaintiff in error.

Mr. A. W. Terrell, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action in trespass to try the title to eleven leagues of land situated in the counties of Bell, Milam, and Williamson, State of Texas, on what was once called San Andres River, now known as Little River, a tributary of the Brazos.

In support of his claim the plaintiff read in evidence, without objection, certified copies from the general land-office in Texas, of numerous papers, constituting, together, a grant of the land in controversy to Miguel Davila, a native and resident of Leona

Vacario, the capital of the department of Coahuila and Texas, as constituted in the year 1830. These papers, including the official survey made by the surveyor-general, show that the land embraced in that grant was "located on the right or south bank of San Andres River, at the point where the creeks — Buffalo Creek and Donahoe's Creek — empty into said river." The limits, boundaries, and corners of the land thus granted are given in detail.

The plaintiff then offered in evidence an original deed, in the Spanish language, purporting to have been executed by the grantee, Davila, to James Hewetson, at the city of Saltillo, on the 7th of May, 1839, before its acting mayor, and by which Davila sold and conveyed to Hewetson, for the consideration of $200, "eleven leagues of land, obtained from the public domain by virtue of a permit issued for them to him by the executive of the State of Coahuila and Texas, by order of July 13, 1830, which leagues are situated *ten* on the waters of the creek called *Chocktaw of the Red River*, and *the eleventh* between *Sulphur Fork Creek of Red River*, *and the south fork of said creek*, distant about twenty miles west of the road leading from Nacogdoches to Kiamichi, *of the same Red River*, the survey of which is embodied in the patent issued *at Angelina*, *jurisdiction of Nacogdoches*, on the 30th of January, 1836, by *Don Vicente Aldrete*, commissioner appointed for that purpose by the aforesaid executive." That patent the officer before whom the deed was executed certified he had *seen*, *read*, and *then passed and delivered to Hewetson*.

In connection with the offer to read that deed the court, by request of the defendants, and without objection upon the part of the plaintiff, considered certain other papers, also certified from the general land-office in Texas, which, together, constituted the title or grant to Davila of eleven leagues of land in the Red River region, the locality and boundaries of which, as set forth in those papers, corresponds exactly with the foregoing description of the eleven leagues embraced in the deed to Hewetson.

The defendants then objected to the introduction of the Hewetson deed upon the ground that it did not convey, or purport to convey, the land in controversy, and was, therefore, irrele-

vant and inadmissible. The objection was sustained, and the deed excluded, to which action of the court the plaintiff excepted.

1. This ruling of the court below is the subject of the first assignment of error. We are of opinion that the deed was properly excluded. The plaintiff's petition alleged title in himself to eleven leagues of land, granted to Miguel Davila, described as eleven leagues of land "situate on the right or south bank of the *San Andres River, at the place where Buffalo Creek and Donahoe's Creek empty into said river.*" The papers read in evidence by plaintiff, and constituting the final title, as shown upon the records of the general land-office, to the eleven leagues thus described, show that the survey of *that* body of land was made by Surveyor-General Johnson, and that the patent, based upon that survey, was issued Oct. 18, 1833, by L. Lessassier, mayor of the city of San Felipe de Austin. We have seen that the deed from Davila to Hewetson describes eleven leagues of land situated in a different part of the State, distant, as the court may judicially know, about two hundred miles from the land described in the petition and in the papers previously read in evidence as constituting the grant to Davila of the land in dispute. This is rendered absolutely certain by an examination of the several papers constituting the grant to Davila of the eleven leagues of land on the waters of Red River.

From those papers it appears, —

That on the 10th of July, 1830, Davila made application for a grant by sale to him of eleven leagues of land of the public domain of the department of Coahuila and Texas;

That this application was granted on the 13th of July, 1830, with an order to the alcalde of the municipality to put Davila in possession after the land was located;

That on the 17th of May, 1834, Davila executed to James Hewetson an irrevocable power of attorney, authorizing him to select out of the public domain of the State the eleven leagues of land conceded to Davila in the year 1830;

That on the 5th of June, 1834, Hewetson executed to M. B. Menard, of Nacogdoches, a power of substitution, which on the 24th of May, 1835, was revoked, and the authority which Hewetson had received from Davila was conferred upon one John Cameron;

That on the 27th of July, 1835, George Aldrich, surveyor, under an order from the special commissioner appointed by the governor of the State, of date July 2, 1835, surveyed one of the eleven leagues "between Sulphur Fork of Red River and the south branch of said creek, about twenty miles west of the road leading from Nacogdoches to Kiamichi, of the Red River;" and on the 3d of November, 1835, he surveyed the remaining ten leagues "on the waters of the creek called Choctaw Bayou of Red River;"

That these surveys were transmitted to the special commissioner, who, by order of Jan. 30, 1836, directed title to issue; and it was so issued on that day, the final paper describing the land exactly as set forth in the deed to Hewetson, and referring, by way of identification, to the field-notes of the surveyor, Aldrich.

While the origin of the title of the eleven leagues on the San Andres River, as well as of the eleven leagues on the Red River, may have been an application of Davila on the thirtieth day of July, 1830, it is perfectly clear that there were, in fact, surveys of two distinct bodies of land, widely separated, resulting in grants to Davila of two different tracts of eleven leagues each. This is shown, partly, by the fact that the final document in the title for the eleven leagues on the San Andres River was executed by Lessassier on the 18th of October, 1833, at San Felipe de Austin, while that for the eleven leagues on Red River was executed by Special Commissioner Vicente Aldrete, at Angelina, and not until Jan. 30, 1836. The former body of land was embraced in one survey, made by Surveyor-General Johnson, while the latter was surveyed by Aldrich, and was embraced in two surveys, one of which called for ten leagues, and the other for one league.

It thus appears that the plaintiff, in support of his title to eleven leagues of land on the *San Andres River*, offered to read a deed which upon its face clearly and, in connection with the papers relating to the *Red River* lands, incontestably showed that the land it purported to convey was not the land described in the petition, and the title to which was in dispute.

The contention of the plaintiff is that it was for the jury to say whether the land described in the Hewetson deed was the

same land which in the title papers read in evidence was described as situated on San Andres River. No such conclusion could, however, have been fairly reached by the jury consistently with the evidence. The deed was unambiguous in its terms; and whether interpreted by its own language, or in the light of the papers constituting the grant to the Red River lands, there was no ground whatever to infer that Davila, by the conveyance of lands on Red River, intended to convey the title to lands on San Andres River.

Whether the grant to Davila of the lands on Red River was void by reason of the prohibition against uniting more than eleven leagues in the same lands, or because of the declaration in the Texas Constitution of 1836, to the effect "that all surveys and locations made since the act of the late consultation closing the land-offices and all titles made since that time are null and void," it is not necessary to inquire. For, if that proposition be conceded, it is nevertheless manifest that the papers constituting the grant to the Red River lands, read without objection, were evidence in illustration or explanation of the excluded deed; and they utterly negative the idea that the grantor, by a conveyance of eleven leagues, situated on the Choctaw and Sulphur Creeks of the Red River (quoting from the deed), "the survey of which is embodied in the patent issued at Angelina, jurisdiction of Nacogdoches, on the thirtieth day of January, 1836, before Don Vicente Aldrete, commissioner," &c., intended to pass the title to eleven leagues of land on San Andres River, the final title to which passed by patent issued Oct. 18, 1833, at the city of San Felipe de Austin, by L. Lessassier, mayor of said city and its municipality.

It is scarcely necessary to cite the authority of text-writers, or of adjudged cases in the Supreme Court of Texas or elsewhere, to prove that the deed was inadmissible as evidence in support of plaintiff's title to the land described in the petitions and in the papers read in evidence by him as constituting the original grant to Davila of eleven leagues on San Andres River. The deed conveys lands that were surveyed and located in the Red River region. It was, therefore, inadmissible for the plaintiff in this action, in any view which may be properly taken of the case.

2. The plaintiff then offered in evidence a deed from Inez (the legitimate daughter and only heir-at-law of Miguel Davila) and her husband, dated Sept. 28, 1869. It was acknowledged by the wife on the 12th of September, 1876, upon privy examination before the consul of the United States for Saltillo and its dependencies, and by the husband a few days thereafter. That deed recited that Miguel Davila had many years before sold to James Hewetson his concession of eleven leagues of land on the San Andres River, and had on May 7, 1869, by public act conveyed the same to said Hewetson, "describing said land *by mistake* as being situated in another part of Texas instead of where it was in fact situated." The deed ratifies and confirms the sale to Hewetson, and releases and conveys to him all the right, title, and interest of the grantors.

That deed, upon the objection of defendants, was also excluded, which ruling constitutes the next error assigned by the plaintiff.

No error was committed in rejecting that deed as evidence in support of plaintiff's claim. This action was commenced in 1874. At that time the deed had not been acknowledged so as to pass the title, if any, which the female grantee had in the premises in controversy. Her interest in the land, if any she had, was her separate estate, of which she could not, under the laws of Texas, be divested, except by the conveyance of herself and husband, and after her privy examination before the proper officer. Such examination had not taken place when this action was commenced. The plaintiff could not avail himself in this action of a title acquired, or which did not subsist in him until, after he commenced suit. The title at the beginning of the action was the question to be tried.

3. The plaintiff finally offered to read in evidence a deed purporting to have been executed in 1873 by the heirs of James Hewetson to the plaintiff and another. This deed was very properly excluded upon the ground that the plaintiff had failed to connect himself with the sovereignty of the soil, and declined to state that he expected to show any other title than that previously offered.

The court thereupon instructed the jury, as was its duty to do, to find for the defendants.

Judgment affirmed.

BECHTEL v. UNITED STATES.

1. Sect. 5597 of the Revised Statutes saves all rights which had accrued under any of the acts repealed by sect. 5596.
2. The United States brought suit, Oct. 9, 1872, against A. on his bond, conditioned that he should account and pay for certain stamps. Pleas, *non est factum*, the non-delivery of the stamps, and performance. At the trial in April, 1876, the court, over A.'s objection, permitted the plaintiff to put in evidence a copy of the bond and of A.'s receipts for the stamps, together with a treasury transcript showing a balance due by him of $4,400. To these papers was attached a certificate bearing date Oct. 11, 1872, and reciting that it was issued pursuant to the act of March 3, 1797. The defendant introduced no evidence, but requested the court to charge the jury that he was entitled to have deducted from said $4,400 a commission of ten per cent "on the same as allowed by the act of Congress of June 30, 1864, amended in 1870, and incorporated in the Revised Statutes under section 3425." The court refused so to charge. *Held*, 1. That the papers were competent evidence. 2. That the refusal of the court to charge as requested by the defendant was proper.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Edward Salomon for the plaintiffs in error.
Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

On the 25th of November, 1871, the defendants executed to the United States a bond in the penal sum of $20,000, conditioned that Bock, Schneider, & Co., manufacturers of matches, should account and pay for certain internal revenue stamps therein mentioned to be used in their business. The declaration (which is upon this bond) avers that thereafter the United States delivered to Bock, Schneider, & Co. such stamps of the value of $5,500, and that they had refused and neglected to pay for a portion of them of the value of $4,400.

The defendants pleaded *non est factum*, performance, and the non-delivery of the stamps.

The case was tried by a jury, and a verdict and judgment were rendered for the United States.

Upon the trial, the United States offered in evidence a cer-

tified copy of the bond and certified copies of the receipts of Bock, Schneider, & Co. for the stamps, both from the Treasury Department, and a treasury transcript of the account of Bock, Schneider, & Co., showing a balance of $4,400 against them. The defendants objected to this evidence being received, and asked the court to instruct the jury to find in their favor. The court admitted the evidence, and refused the instruction. The defendants excepted as to both points.

"The defendants then asked the court to charge the jury and direct that the defendants were entitled to have deducted from the balance shown to be due by the treasury accounts ten per cent commission on the same, as allowed by the act of Congress of June 30, 1864, amended in 1870, and incorporated in the Revised Statutes under sect. 3425, page 677.

"The court, after argument, denied the motion, and the defendants excepted.

"The court thereupon directed the jury to find a verdict for the plaintiffs for the sum of $4,400, principal, with interest from October , 1872, to the date of said trial, at seven per cent per annum, being the sum of $1,052.30, making a total of $5,452.30; to which direction the defendants excepted.

"The jury rendered a verdict as directed."

The brief of the counsel for the plaintiffs in error is confined to two points: —

1. The admission of the documentary evidence from the Treasury Department; and,

2. The refusal of the court to instruct the jury to allow the deduction of ten per cent claimed by the defendants.

Our remarks will be confined to these subjects. We shall consider them in the order in which we have named them.

The suit was commenced and put at issue by the pleadings, and the copies and transcript from the treasury bear date more than two years before the Revised Statutes were enacted, but their enactment was prior to the trial. They were approved by the President on the 22d of January, 1874, and then took effect.

The repealing section, 5596, included the act of March 3, 1797, c. 20 (1 Stat. 512); but sect. 5597 saved all rights which had accrued under any of the acts thus abrogated. It

declared that all such rights "shall continue and be enforced in the same manner as if said repeal had not been made." Sect. 886 of the Revised Statutes, relied upon by the counsel for the plaintiffs in error, is not, therefore, the statutory provision by which the rights of the parties as to the point here in question are to be determined. They are governed by the second section of the act of 1797, before mentioned, upon which sect. 886 of the later enactment is founded. They are materially different, and the latter is narrower than the former.

The act of 1797 was the first regulation upon the subject made by Congress. The second section declares that "*in every case of delinquency* where a suit has been or shall be instituted, a transcript from the books and proceedings of the treasury, certified," &c., "shall be admitted in evidence, and the court trying the cause shall be thereupon authorized to grant judgment and award execution accordingly; and all copies of bonds," &c., "relating to or connected with *the settlement of any account between the United States and an individual*, when certified," &c., "may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court."

This section clearly comprehends the case before us.

The first section directs suit to be brought against "any revenue officer or other person accountable for public money" who shall become a defaulter. If it be said that the second section is limited by the first to the classes of persons named in the first, there are several answers.

It will be observed that the language of the second section contained no such restriction. It is general. Its terms are "*in every case of delinquency*," and again, "the settlement of *an account* between the United States and *an individual*." The act contains seven sections. The fourth, fifth, sixth, and seventh apply indisputably to all debtors of the United States, without discrimination.

The third section, fairly considered, must be regarded as no less comprehensive.

The second section, being remedial in its character and relat-

ing to the law of procedure, is to be liberally construed with reference to the purpose of its enactment. Sedgwick, Statutory and Constitutional Law, pp. 311, 315, and notes.

This precise question came before the Circuit Court in *United States* v. *Lent*, 1 Paine, 417. Mr. Justice Thompson there said: —

"The construction contended for on the part of the plaintiffs in error, that this provision, as to the admission of authenticated copies, is restricted to certain cases, where suits are commenced under authority given by the first section of the act, *cannot be sustained*, although it is not perceived why the present is not such a case. But *the provision is general, and applies to all cases where the evidence is required*, and is founded upon a proper precaution to guard against the loss of the original."

See also *United States* v. *Lee*, 2 Cranch, C. C. 462.

As the act of 1797 has been repealed, we forbear to pursue the subject further.

A few words will be sufficient to dispose of the other point.

It arises under the act of June 30, 1864, c. 173, sect. 161. 13 Stat. 294; Rev. Stat., sect. 3425. The deduction claimed of ten per cent is allowed by the statute to a purchaser "who furnishes his own die," &c. The defendants declined to give any evidence to the jury, and it certainly does not appear by the record that any was adduced on this point. But it is said it was treated by the government at the trial as a conceded fact. There is no such admission here by the counsel of the United States.

We cannot look beyond the record, and that is silent upon the subject.

It is said, further, that the transcript shows the deduction from a charge for stamps of $1,100, not here in controversy. It would be a long stride in dialectics, and one we are not prepared to take, from this fact to the inference, that the purchaser also furnished the die when the stamps in question were bought. The conclusion claimed from such premises would be a palpable *non sequitur*.

It is rather to be inferred that the allowance was made in

one case because the die was furnished, and refused in the other because it was not.

Error must be affirmatively shown. It is not to be presumed.

Judgment affirmed.

CRAMPTON *v.* ZABRISKIE.

1. Under the laws of New Jersey, the Board of Chosen Freeholders of the County of Hudson had no authority, Dec. 14, 1876, to purchase lands whereon to erect a court-house, and to issue in payment therefor bonds payable out of the amount appropriated and limited for the fiscal year commencing Dec. 1, 1877.
2. Unless otherwise provided by legislative enactment, a resident tax-payer has the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which he in common with other property-holders may otherwise be compelled to pay.
3. After the Supreme Court of New Jersey had decided that the resolution adopted by the board for such purchase and payment was illegal, A., the vendor of the lands, brought an action on said bonds against the board. Thereupon certain resident tax-payers filed their bill, praying that A. be restrained from prosecuting that action or one to recover the value of the lands; that the board be enjoined from paying the bonds, and directed to convey the lands to A., and that he be required to accept a deed therefor. *Held*, that they were entitled to the relief prayed for.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

"The Board of Chosen Freeholders of the County of Hudson," in the State of New Jersey, adopted, Dec. 14, 1876, a resolution for the purchase of certain lots in Jersey City, on which to erect a court-house and offices for the county, at the price of $2,000 for each twenty-five hundred square feet. In payment therefor the county was to issue to the owner of them bonds "payable out of the amount appropriated and limited for the expense of the next fiscal year; said bonds to run one year from the date thereof, and bearing interest at the rate of seven per cent per annum."

Crampton, the owner, in accordance with the terms of the resolution, accepted the proposition of purchase, and delivered, Dec. 22, 1876, to the board a duly executed deed for the lots,

bearing date the 18th of that month. The board accepted it, caused it to be duly recorded in the register's office of the county, and delivered to Crampton three several bonds for the purchase-money, amounting to $225,720.

One of the bonds is as follows: —

"$75,000.

"STATE OF NEW JERSEY, COUNTY OF HUDSON.

"No. 1.

"TEMPORARY LOAN BOARD.

"Know all men by these presents, that the Board of Chosen Freeholders of the county of Hudson acknowledge themselves indebted, for value received, to Mahlon B. Crampton, in the sum of seventy-five thousand dollars, lawful money of the United States of America, to be paid to the said Mahlon B. Crampton, at the county collector's office in the county of Hudson, on the eighteenth day of December, one thousand eight hundred and seventy-seven, with interest thereon from the date of these presents, at the rate of seven per cent per annum, payable annually.

"This bond being executed and issued in pursuance of a resolution of the said board passed the fourteenth day of December, A.D. 1876, and approved by the director at large Dec. 16, 1876, authorizing the county collector to issue the same for the use of the county in payment for land purchased by said board in pursuance of said resolution.

"In witness whereof, the Board of Chosen Freeholders of the County of Hudson have hereunto affixed their corporate seal and caused these presents to be signed by their director at large this twenty-second day of December, eighteen hundred and seventy-six.

[L. S.] "E. W. KINGSLAND,

"County Collector of the County of Hudson.

"D. C. HALSTED, *at large,*

"Director of the Board of Chosen Freeholders of the County of Hudson.

(On the margin:) "Board of Chosen Freeholders Hudson County."

The other bonds are of the same purport, except that one of them is for $75,720. Crampton assigned the latter to one Harrison, who, in consideration thereof, released the lots from a mortgage in his favor to which they were subject.

Crampton, March 13, 1878, brought suit against the board on

the other bonds in the court below. Zabriskie and two other resident tax-payers of the county thereupon filed their bill of complaint on the equity side of that court, praying that the bonds be declared void and be delivered up, that the board be ordered to reconvey the property to Crampton, and that he be enjoined from prosecuting an action on or parting with the bonds in any other way than by surrendering them to the board. The bill alleges that Siedler and other tax-payers of the county applied to the Supreme Court of the State by writ of *certiorari* for relief against said resolution and purchase, and that the court, by its final judgment rendered Nov. 22, 1877, declared that said resolution was illegal and void. It further alleges that the lots should have been then conveyed to Crampton and the bonds surrendered to the board, "but that nothing had been done by either in the matter."

Crampton sets up that the transaction between him and the board was in all respects lawful, that he was not a party to the proceedings before the Supreme Court, that it was not his duty to surrender the bonds, and that if the latter are void, the defence is available at law.

The court below, Oct. 1, 1879, rendered a decree in accordance with the prayer of the bill, and also restrained Crampton from suing for the value of the lots. He thereupon appealed.

The boards of chosen freeholders are created by the act of April 16, 1846, bodies corporate and politic, and invested with certain powers, among which is that of purchasing, receiving, and holding lands in trust to and for the use of the respective counties.

Under the fourth section, it is the duty of the board at its stated annual meeting, or at any other meeting held for the purpose, to vote, grant, and raise such sums of money as it deems necessary and proper for the building of jails and court-houses, and doing, fulfilling, and executing all the legal purposes, objects, and business of the county; and, after it has passed an order or grant for the raising of any sum of money, it is required by the twelfth section to direct, in writing, the assessors of the several townships to assess the said sum or sums on the inhabitants and their estates, agreeably to the law for

the time being, for the raising of money by taxation for the use of the State.

Whenever the needs of the county require it, the thirteenth section authorizes the board to assess and collect money by taxation, for the use of the county, at a different time from the assessment for the State tax.

An act approved Feb. 26, 1874, designates the 1st of December as the commencement of the fiscal year of the board for the county of Hudson; and its fifth section provides "that the expenditures of the board of chosen freeholders in any fiscal year shall not exceed the amount raised by tax for said year, unless by the spread of an epidemic or contagious disease a greater expenditure shall be required for the protection of the public health, and the board may fix the amount to be raised by tax for county purposes at any meeting of said board held prior to July (15th) fifteenth in any year."

The following act of the legislature was approved Feb. 7, 1876:—

"*A Supplement to an act entitled 'An Act for the punishment of crimes,' approved March twenty-seventh, eighteen hundred and seventy-four.*

"1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that if any board of chosen freeholders, or any township committee, or any board of aldermen or common councilmen, or any board of education, or any board of commissioners of any county, township, city, town, or borough in this State, or any committee or member of any such board or commission, shall disburse, order or vote for the disbursement of public moneys, in excess of the appropriation respectively, to any such board or committee, or shall incur obligations in excess of the appropriation and limit of expenditure provided by law for the purposes respectively of any such board or committee, the members thereof, and each member thereof, thus disbursing, ordering or voting for the disbursement and expenditure of public moneys, or thus incurring obligations in excess of the amount appropriated and limit of expenditure as now or hereafter appropriated and limited by law, shall be severally deemed guilty of malfeasance in office, and on being thereof convicted shall be punished by fine not exceeding one thousand dollars or imprisonment at hard labor for

any term not exceeding three years, or both, at the discretion of the court.

"2. And be it enacted, that this act shall take effect immediately."

The members of the Board of Chosen Freeholders are elected at the spring charter and township elections, and hold their offices for one year commencing in May and until their successors are chosen and legally qualified.

It does not appear that the board at any meeting prior to July 15, 1877, included in the amount to be raised by taxation the purchase-money for the lots in question.

Mr. Frederick T. Frelinghuysen and *Mr. Joseph D. Bedle* for the appellant.

The bonds are valid; and if they are not, Crampton should not have been enjoined from prosecuting an action for the recovery of the purchase-money for the lots.

He was not a party to the proceedings on *certiorari*, and is therefore not bound by the judgment rendered in them. The Supreme Court of New Jersey expressly held that its decision was "not upon the validity of his claim." He may, therefore, insist upon it here, notwithstanding that court was of opinion that the resolution was in violation of statutes that are merely directory, but which the board could not plead in avoidance of his rights under an executed contract. An order setting aside the resolution after it had been carried into effect cannot cancel the obligation of the bonds, or impair the title which passed by his conveyance.

It must be conceded that by the original act creating the county of Hudson, its board of freeholders had all the rights, power, and authority vested in any other board, and that no limitation other than the public needs, of which it was the exclusive judge, was imposed upon its power to purchase land whereon to erect buildings for the use of the courts and public officers, or for any other authorized purpose.

The only objection made below to the bonds is grounded upon the assumption that the statutes of 1874 and 1876 prohibit a contract by which the board gains a credit beyond the fiscal year in which such a purchase is made.

The act of 1874 only requires that the *expenditures* of the fiscal year shall not exceed the amount raised by taxation for

that year. It will not be questioned that under its general powers the board had the right to purchase land and erect a court-house thereon. The current of authority is that a municipal corporation may borrow money for any appropriate purpose within the scope of its charter. *Bank* v. *Chillicothe*, 7 Ohio, Part II. 31; *State* v. *Madison*, 7 Wis. 688; *Clark* v. *Janesville*, 10 id. 136; *Mills* v. *Gleason*, 11 id. 470. The properly constituted authorities of a municipality may bind the corporation whenever they have power to act in the premises. *Cincinnati City* v. *Morgan*, 3 Wall. 275. Authority to build a court-house carries with it the right to borrow money to build it, *Lynde* v. *The County* (16 id. 6); and bonds or notes may be given for any authorized work or purchase. *The Mayor* v. *Ray*, 19 id. 468. But although there may be some conflict in the decisions as to the power of a municipality to borrow money, there is none as to its power to contract for work or property on credit. There is a wide and manifest difference between incurring *a debt* in the prosecution of a purpose expressly sanctioned by statute and *borrowing money* with a view to such prosecution.

The learned district judge who decided this case below says, "The contract for the purchase was consummated on the 22d of December, 1876, and if the board at any regular meeting, or special meeting, called for the purpose prior to the 15th of July following, had included the consideration money to be paid in the amount to be raised by tax for the fiscal year, it is difficult to perceive any illegality in the transaction."

The board had, in his opinion, the right to give the bonds in question. The illegality then consists in the alleged failure to provide in the proper fiscal year the money to pay them. Crampton is in no wise responsible for that failure, and neither the board nor the tax-payers can set up its wrong to bar his claim for the stipulated price of the property. His reasoning substantially amounts to this, — the bonds were valid when given; but inasmuch as the board neglected to levy a tax to pay them at maturity, the defence of *ultra vires* must be sustained.

It does not, however, appear that when the bonds were due there was not money enough in the treasury to pay them.

There is no evidence whatever in the record of the amount raised or then unexpended, and the burden of proof of any fact in discharge of the liability rests upon the board and not upon Crampton.

The act of 1876 must receive a strict construction. The object was not to impair obligations incurred, but to reach offending individual members of the board. Its terms do not justify the assumption that it was the legislative intent to render absolutely void a contract in contravention of them. It contemplates certain things accomplished, — the disbursement as a fact, and the obligation incurred as an existing liability. Its policy was not to punish a third party who contracts with the board, and delivers to it his property.

But if the bonds are void, they are mere evidences of debt, and can be severed from the consideration of the debt. The right of recovery on the consideration still subsists and may be enforced. *Hitchcock* v. *Galveston*, 96 U. S. 341.

Mr. J. H. Lippincott and *Mr. Peter Bentley* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 14th of December, 1876, the Board of Chosen Freeholders of the County of Hudson, in New Jersey, passed a resolution to purchase of the defendant, Crampton, certain real property in Jersey City, upon which to erect a court-house and other buildings for the county, at the price of $2,000 for every 2,500 square feet, the price at which he had previously offered to sell the same, and to issue to him in payment thereof bonds of the county, payable out of the amount appropriated and limited for the expenses of the next fiscal year, the bonds to run for one year and to draw interest at the rate of seven per cent per annum. The bonds were to be signed by the director at large and the collector of the county, and to be issued under its seal. On the 18th of December, Crampton executed and delivered to the board a conveyance of the property, which was accepted and recorded in the office of the register of deeds; and thereupon three bonds were executed and delivered to him, two of which were for the sum of $75,000, and one was for $75,720. No provision was made by the board for the payment

of the bonds beyond the general declaration that they should be paid out of the amount appropriated and limited for the next fiscal year. By the law then in force the fiscal year commenced on the first day of December of each year, and the expenditures of the board were restricted to the amount raised by tax for that year, unless by the spread of an epidemic or a contagious disease a greater expenditure should be required; and the amount to be raised was to be determined at a meeting of the board to be held prior to July 15 of each year. Some of the resident tax-payers were dissatisfied with this issue of bonds without making definite provision for their payment by taxation, and accordingly obtained from the Supreme Court of the State a writ of *certiorari* to review the proceedings of the board. The court adjudged the proceedings invalid, and set the same aside.

It does not appear that any attention was paid either by the board or Crampton to this judgment. The board did not reconvey or offer to reconvey the land to Crampton; nor did the latter return or offer to return to the board the bonds received by him. But, on the contrary, Crampton commenced an action in the Circuit Court of the United States to enforce their payment. The present suit, therefore, is brought by other tax-payers of the county to compel the board to reconvey the land and Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment.

The facts here stated are not contradicted; they are substantially admitted; and upon them the court below very properly rendered a decree for the complainants. Indeed, upon the simple statement of the case, it would seem that there ought to be no question as to the invalidity of the proceedings of the board. The object of the statute of New Jersey defining and limiting its powers would be defeated if a debt could be contracted without present provision for its payment in advance of a tax levy, upon a simple declaration that out of the amount to be raised in a future fiscal year it should be paid. The law, in terms, limits the expenditures of the board, with a single exception, to the amount to be raised by taxation actually levied, not by promised taxation in the future. And, as if this limitation was not sufficient, it makes it a misdemeanor in any mem-

ber of the board to incur obligations in excess of the amount thus provided. It would be difficult to express in a more emphatic way the will of the legislature that the board should not incur for the county any obligations beyond its income previously provided by taxation; in other words, that the expenses of the county should be based upon and never exceed moneys in its treasury, or taxes already levied and payable there.

Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations.

Decree affirmed.

BIBLE SOCIETY v. GROVE.

1. A party is not entitled to the removal of a suit from a State court into the Circuit Court on account of prejudice or local influence, unless the adverse party is a citizen of the State in which the suit was brought.
2. A suit tried in a State court April 14, 1875, was, on the disagreement of the jury, continued at that term and the following one. *Held*, that a petition for its removal filed thereafter should not be granted.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

Mr. George P. Strong for the plaintiff in error.
Mr. L. Danford, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit begun on the 6th of March, 1868, in a State court, by a part of the heirs-at-law of Jacob E. Grove, to set aside his will. The defendants were the executors of the will, the legatees or devisees, and some of the heirs. The case was tried four times in the State court, and the venue was changed twice. At three of the trials the jury disagreed. At the other a verdict was given for the plaintiffs, which the court set aside. The last trial commenced April 14, 1875, at the January adjourned term of the Circuit Court of Macon County, Missouri, and resulted in a disagreement of the jury. At the next term, beginning on the third Monday in May, the cause was continued.

On the 21st of September, 1875, the American Bible Society, one of the defendants in the suit, a New York corporation, and a legatee under the will, filed its petition for the removal of the cause to the Circuit Court of the United States. The ground of removal is thus stated in the petition: —

"That said John A. Grove and others, plaintiffs as aforesaid, are residents and citizens of the State of Ohio, and other States other than the State of New York; that none of said plaintiffs reside in or are citizens of the State of New York; that said controversy is wholly between citizens of different States, and can be fully determined as between them; that

petitioner is actually interested in said controversy (being the only party whose interests plaintiffs profess to desire to affect in said controversy); that the amount involved in said controversy exceeds $5,000. Petitioner further states that it has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in said Circuit Court of Macon County aforesaid." Accompanying the petition was the necessary bond, and an affidavit of the attorney of the petitioner, stating his belief of the facts set forth, and that from local influence and prejudice the petitioner would not be able to obtain justice in the State court. It nowhere appears from the petition or the record that either of the plaintiffs was a citizen of Missouri.

A copy of the record in the suit was duly filed in the Circuit Court of the United States, and the cause docketed there. At the first term the plaintiffs appeared and moved that the cause be set down for hearing; but the court adjourned without disposing of the motion. On the 6th of March, 1876, and during the vacation, the plaintiffs filed in the office of the clerk another motion to remand the cause, on the grounds, among others, 1, that the petition for removal was not filed before or at the term in which the cause could be first tried; and, 2, that it did not appear that the plaintiffs, or either of them, were citizens of Missouri. At the next term this motion was granted. To reverse that order the case has been brought here.

We think the decision below was right. The courts of the United States are not required to take any suit until in some form their jurisdiction is made to appear of record. This rule applies to suits coming to them by removal as well as to those in which they issue the original process.

Suits cannot be removed from the State courts on account of "prejudice or local influence," unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought. The express provision of the statute is, that "when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed, on the petition of the latter." Rev. Stat., sect. 639, sub-sect. 3. The act of March 3, 1875 (18 Stat. 470), has not changed this provision of the Revised Statutes. Removals for

this cause still depend on that section, which is a reproduction of the act of 1867. 14 id. 558. As the plaintiffs are not shown to have been citizens of Missouri, it is clear that the defendants were not entitled to take the case to the courts of the United States on this ground.

To effect a removal under the act of March 3, 1875, the petition must be filed in the State court "before or at the term at which said cause could be first tried and before the trial thereof." Sect. 3. This has been held to mean, in respect to suits pending when the act was passed, that the petition must be filed at the first term of the court thereafter at which the cause could be tried. *Removal Cases*, 100 U. S. 457. The act took effect from the time of its approval, March 3. The case was actually tried once in the State court, on the 14th of April following. The jury disagreeing, it was continued at that term and also at the May term. The petition for removal was not filed until September afterwards. Clearly this was too late.

It is unnecessary to consider any of the other objections to the jurisdiction of the Circuit Court which have been raised.

Judgment affirmed.

GATES *v.* GOODLOE.

1. Where the defendant in error moved to dismiss a writ sued out by three partners, two of whom had previously received their discharges in bankruptcy, on the ground that the assignee alone could prosecute it, the court grants the application of the latter to be substituted as a plaintiff in error.
2. *Semble*, that the partner against whom no bankruptcy proceedings were instituted might have sued out the writ, using, if necessary, the names of all the parties against whom the judgment had been rendered.
3. The court reaffirms the ruling in *The William Bagaley* (5 Wall. 377), that a resident of a section in rebellion should leave it as soon as practicable, and adhere to the regular established government; and furthermore holds that one who, abandoning his home, enters the military lines of the enemy, and is in sympathy and co-operation with those who strive by armed force to overthrow the Union, is, during his stay there, an enemy of the government, and liable to be treated as such, both as to his person and property.
4. When in 1862, at a time when there was no such substantial, complete, and permanent military occupation and control of Memphis as has been held

sometimes to draw after it a full measure of protection to persons and property, and when no pledge had been given which would prevent the general commanding the forces of the United States from doing what the laws of war authorized, and his personal judgment sanctioned, as necessary for and conducive to the successful prosecution of the war, — *Held*, that he had the right to collect rents belonging to a citizen who had gone and remained within the lines of the enemy, and hold them subject to such disposition as might thereafter be made of them by the decisions of the proper tribunals.

5. A lessee who was dispossessed by the military authorities under such circumstances and deprived of the use and control of the demised premises, is discharged from liability to his lessor for rent accruing during the period of such dispossession.

ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

Mr. Luke W. Finlay for the plaintiffs in error.

Mr. Joseph B. Heiskell, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The original decree in the second Chancery Court of Shelby County, Tennessee, for $8,821.49, was rendered against S. M. Gates, A. M. Wood, and Milton McKnight, partners under the name of Gates, Wood, & McKnight, and on appeal to the Supreme Court of Tennessee, it was, to the extent of $7,840.25, affirmed Oct. 13, 1875. On the 1st of August, 1876, Gates and Wood received discharges in bankruptcy, releasing them individually from all provable debts and claims existing against them on the 22d of April, 1876, other than those which, by law, were excepted from the operation of such a discharge. The present writ of error was sued out Oct. 30, 1876, by all the partners. The defendant in error now moves to dismiss it, upon the assumption that the assignee in bankruptcy could alone prosecute it. Undoubtedly, the assignee had the right to prosecute that writ, so far, at least, as it concerned those whom he represented. If the bankrupts could not themselves, under any circumstances, properly sue it out after their discharge (and upon that question we express no opinion), all difficulty, in that respect, has been removed by the application of the assignee for an order here substituting him as a plaintiff in error. His application is now granted, and he is allowed to prosecute the writ in behalf of the bankrupts. Independently, however, of that

application, we are not prepared to say that McKnight, the partner against whom no bankruptcy proceedings were instituted, might not have sued out the writ, using for that purpose, if necessary, the names of all the parties against whom the original decree was rendered. With both the assignee in bankruptcy and McKnight before the court, there is no sound reason why the cause should not proceed to a final determination upon the errors assigned.

Coming, then, to the merits of the case, we find that the original plaintiffs in error specially claimed a right or immunity in virtue of an authority exercised under the United States. The right or immunity, so claimed, was denied, first in the court in which the suit originated, and subsequently in the Supreme Court of the State of Tennessee.

The facts upon which that claim rests, or out of which it arises, are, briefly, these: —

On the 6th of June, 1862, military possession was taken of the city of Memphis by the Union forces then engaged in suppressing armed insurrection against the national authority. During the succeeding month General Sherman, having been previously assigned by competent military authority to the command of the district of West Tennessee, reached that city with reinforcements, and assumed control of the forces in that locality.

Shortly thereafter he published orders, reopening trade and communication with the surrounding country, and prescribing rules in conformity with which travel in and out of the city should be conducted. On the 7th of August, 1862, pursuant to orders from General Grant, his superior officer, specific instructions were issued by him to the quartermaster in charge at Memphis, concerning vacant stores and houses in that city, and also as to buildings which were occupied, but the owners of which had "gone South," leaving agents to collect rent for their benefit. With reference to the latter class of buildings his instructions, or rather orders, were: "Rent must be paid to the quartermaster. No agent can collect and remit money South without subjecting himself to arrest and trial for aiding and abetting the public enemy."

The object of these regulations was thus distinctly set forth by General Sherman in his letter of instructions: "I under-

stand that General Grant takes the rents and profits of this class of real property, under the rules and laws of war, and not under the Confiscation Act of Congress; therefore the question of title is not involved, — simply the possession, and the rents and profits of houses belonging to our enemies, which are not vacant, we hold in trust for them, or the government, according to the future decision of the proper tribunals." He concluded his letter in these words: "We have nothing to do with confiscation. We only deal with possession, and, therefore, the necessity of a strict accountability, because the United States assumes the place of trustee, and must account to the rightful owner for his property, rents, and profits. In due season courts will be established to execute the laws, the Confiscation Act included, when we will be relieved of this duty and trust. Until that time every opportunity should be given to the wavering and disloyal to return to their allegiance to the Constitution of their birth or adoption."

These instructions do not appear in the present transcript, although they constitute a part of the archives of the War Department, and belong to the public history of the late civil war. Some question may be made as to our right to take judicial notice of them in the determination of this case. But, apart from them, the record sufficiently establishes the fact that the military authorities adopted the general policy indicated by General Sherman's letter of instructions, and a rental agent, designated by those authorities, was charged with the duty, among others, of collecting rents of houses which, although occupied, belonged to persons who had "gone South." To that class of property belonged a storehouse, occupied by Gates, Wood, & McKnight, under a lease executed at Memphis, in 1859, by R. C. Brinkley, the testator of defendant in error, for a term of five years, and for the stipulated rent of which the lessees had executed their several promissory notes, payable quarterly during the whole period of the lease. Brinkley, upon the approach of the Union forces, left his home in Memphis, and went within the lines of the Confederate forces, where he remained until 1864.

Gates, Wood, & McKnight were notified by the military rental agent, in the summer of 1862, to pay him the rents going

to Brinkley. They refused to recognize that order, or to so pay the rents, and, by reason of such refusal, were dispossessed by the military authorities. Those of their sub-tenants who expressed a willingness to comply with the order were permitted to remain in the occupancy of the premises, paying rent, however, directly to the rental agent of the United States. From the time the lessees were thus dispossessed, until July 11, 1863, the property remained under Federal military control, and all rents arising therefrom were collected by the rental agent, who, in the exercise of his functions, was recognized and sustained by the general commanding the Union forces in that district. During that intermediate period the lessees were neither in possession of the premises, nor permitted by the military authorities to receive any rents accruing therefrom. Their rent notes, covering the period during which they were thus kept out of possession, remained, however, outstanding, in the hands of the lessor or his agent. They constitute the foundation of the judgment or decree in this suit.

Are the lessees liable to the estate of Brinkley for rent, as stipulated in the lease of 1859, for the period when the storehouse was under control of the Federal military? There is no claim here for rents subsequent to July 11, 1863, since, on that day, possession was delivered or control surrendered to the lessor's son, under an arrangement made by him with the military authorities. After the return of the lessor to Memphis, in 1864, the latter took control of the property, and enjoyed the rents. Upon the solution of the foregoing question this case depends.

The Supreme Court of Tennessee was of opinion that the lessees were not discharged from liability upon their contract with Brinkley, by reason of the action taken by the military authorities touching the rents accruing from the property in question. That court recognized the hardship of the case upon the lessees, but consistently with its views of the law the relief asked for could not be given.

We are unable to give our assent to the conclusion reached by that learned court. It is inconsistent with our decision in *Harrison* v. *Myers* (92 U. S. 111), where we held that the lessee was discharged from liability to the lessor for rent of certain

property in New Orleans during the period when the rents and profits arising therefrom were required by the Federal military authorities, occupying and controlling that city in the year 1862, to be paid directly to them. There is some difference in the facts of the two cases, but in their essential features they are alike. That case, it may be here observed, was determined in this court after the rendition of the present decree by the Supreme Court of Tennessee.

Brinkley, in his answer, claims to have gone within the insurrectionary lines as a private citizen and upon private business. He testified that he "never had the honor to go or act in any other capacity, then, before, or since." It was, however, shown that in 1861 he became a member of a military board organized in hostility to the United States. It does not appear when his connection with that body terminated, or when the board itself ceased operations. But it does appear from his own admissions that he had, prior to the occupation of Memphis by the Union forces, contributed money towards the equipment of military companies organized in that State with the avowed purpose of resisting the authority of the national government. When he abandoned his home, and entered the military lines of the enemy, he was, beyond question, in full sympathy and active co-operation with those who sought, by armed force, to overthrow the Union. Neither in his answer nor in his deposition does he intimate that he had any sympathy with the United States in its efforts to suppress insurrection. He was, therefore, in the very fullest legal sense, an enemy of the government during his stay within the military lines of the rebellion, liable to be treated as such both as to his person and property. His remaining there was in plain violation of law and in disregard of duty. In *The William Bagaley* (5 Wall. 377), we said that "it was the duty of a citizen when war breaks out, if it be a foreign war and he is abroad, to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regular established government."

The general commanding the Union forces at Memphis was charged with the duty of suppressing rebellion by all the means which the usages of modern warfare permitted. To that end

he represented for the time, and in that locality, the military power of the nation. He did not assume authority to confiscate Brinkley's rents, nor did he seize them as booty of war; but, by his subordinates, collected and held them subject to such disposition as might be thereafter made of them by the decisions of the proper tribunals. They were seized, *flagrante bello*, in that portion of the territory of the United States the inhabitants whereof had been declared to be in insurrection. There was no such "substantial, complete, and permanent military occupation and control" as has been sometimes held to draw after it a full measure of protection to persons and property at the place of military operations. 16 Wall. 495. No pledge had then been given by the constituted authorities of the government which prevented the commander of the Union forces from doing all that the laws of war authorized, and that, in his judgment, under the circumstances attending his situation, was necessary or conducive to the successful prosecution of the war. He was not bound to risk the possibility of Brinkley's rents being transmitted to him beyond the Union lines. To have permitted the latter to enjoy the benefit of them in any form during his voluntary absence within the military lines of the insurrection might have encouraged him to remain under the protection of the enemy, adding by his presence and means to the enemy's ability to continue the struggle against the government. If, therefore, in the judgment of the commanding general, the security of his own army, or the diminution of the enemy's resources, required that he should prevent those within the Confederate military lines from receiving or using in any way, while there, rents accruing from real estate within the Federal lines, it would be difficult to show that the mode adopted by him to effect that result was not a proper military precaution, entirely consistent with the established rules of war, and having direct connection with the great end sought to be accomplished by the war; to wit, the destruction of armed rebellion, and the complete restoration of the national authority over the insurrectionary district.

The action of the military authorities in seizing the rents arising from the property which Brinkley had leased to Gates, Wood & McKnight not being, then, in violation of law, — that

which was done being regarded as having been done by the authority of the United States in lawful defence of the national existence against armed insurrection, — it results, necessarily, as we think, that the lessees, when dispossessed by military authority and deprived of all future use and control of the leased property, were discharged from liability to the lessors for rent accruing during, at least, the period of such dispossession. They were not discharged from liability for rent which had previously accrued. But since the consideration for their promise to pay rent, from time to time, was the possession and use of the leased property during the term and upon the conditions specified in the lease, and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent stipulated in the contract of 1859, for the period they were thus kept out of possession and enjoyment of the property. The events and contingencies causing that result were not such as the parties anticipated, nor such as we can suppose were in contemplation when the contract was made. Otherwise they would, it must be assumed, have been provided for in the contract.

The conclusion thus reached is abundantly sustained by authority. Indeed, many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed.

In *Melville* v. *De Wolf* (4 El. & Bl. 844), the plaintiff sued for wages agreed to be paid to him as a mariner and carpenter on board of a foreign ship going to the Pacific Ocean. In the course of the voyage complaint was made to a British consul, at a foreign port, of an offence alleged to have been committed by the master of the ship. The consul, in pursuance of a British statute, and having power and jurisdiction so to do, caused the master to be conveyed to England, under restraint, to be there proceeded against in respect of the offence charged; and the consul, having power and jurisdiction so to do, caused the plaintiff to leave the ship, and proceed to England as a witness. The latter did not return to the ship, or render any further

services thereon for the defendant. The question in the case was as to the liability of the defendant for wages according to the articles signed, for the period subsequent to the departure of the plaintiff for England under the direction or order of the consul. The Court of Queen's Bench, speaking by Lord Campbell, C. J., said: "The money paid into court covered the plaintiff's demand for wages during the whole time that he had served on board the ship; and we think that, upon the facts proved, the ship-owners were not liable to pay him wages for a longer period. By authority of the British legislature he was then separated from the ship at a foreign port and sent to England, without any reasonable possibility of his ever being able to reioin the ship during the voyage in which he was engaged. No blame is to be imputed to him, and there has been no forfeiture of wages; but he cannot be considered as having earned the wages in dispute. After he was sent home from Montevideo to England, he neither served under the articles actually or constructively; and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must then be considered as dissolved by the supreme authority of the State, which is binding on both parties." Again: "Then, an act being done by public authority, which rendered any further performance of the contract impossible, we think that the contract was dissolved."

Exposito v. *Bowden* (7 id. 763) has some bearing upon the question. Bowden, a British subject, contracted to make a voyage to Odessa, a Russian port, and bring from there goods belonging to the other contracting party. Before the voyage was completed, war between England and Russia intervened. Bowden thereupon declined to execute the contract, and was sued for damages for failing to do so. The Court of Queen's Bench said: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at the time it is declared, and of which it makes the further execution unlawful and impossible, the authorities establish that the effect is to dissolve the contract, and to so absolve both parties from further performance of it."

The same doctrine was announced in *Barker* v. *Hodgson*

(3 Moo. & S. 267), where Lord Ellenborough said: "If, indeed, the performance of this covenant has been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he has thus been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable in damages."

In his treatise on the law relative to merchant ships and shipping (11th ed., by Shee, 453), Lord Tenterden says: "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved."

To the same effect speak Chancellor Kent (3 Kent, 248) and Mr. Chitty. Chit. Contr. (11th Am. ed.) 1077. The last-named author says: "So the non-performance of a contract will be excused where such non-performance is occasioned by an act done by public authority."

Further citation of authorities would seem to be unnecessary. The reasons assigned in the adjudged cases, and by elementary writers, in support of the principles announced in the foregoing authorities, apply to this case, and should control its determination. The lessees having been permanently deprived, by competent public authority, of the possession of the leased property, the use of which was the sole consideration for the notes sued on, they were discharged from liability upon the notes, which represented the rents accruing during the period of military occupancy and control.

The decree of the Supreme Court of Tennessee will be reversed, with directions to enter, or to cause to be entered in the proper court, a decree of perpetual injunction in accordance with the principles of this opinion; and it is

So ordered.

JONES v. GUARANTY AND INDEMNITY COMPANY.

1. A corporation of New York having authority to mortgage its property for the purpose of carrying on its business is not prohibited by the laws of that State from executing such a mortgage to secure the payment of money to be thereafter advanced.
2. A., as president of B., a corporation, applied to C. for a loan. The latter then advanced $50,000, taking therefor a note of B., payable to the order of D. & Co., — of which firm A. was a member, — and bearing their indorsement. A. also stipulated to deliver to C., B.'s mortgage on its real estate for $100,000, as security for said $50,000 and for any further loans from C. to B. The execution of the mortgage was assented to in writing by B.'s trustees and by A., who was its creditor to a large amount and the holder of nearly all of its capital stock. The mortgage describes the individual obligation of A. as the liability to be secured, but recites that its execution was authorized to secure a loan of $100,000; that A. had given to C. his personal bond in that sum to secure advances made as therein stipulated. It was conditioned for the payment by B. of the amount that might be due upon the instrument secured by it. The bond bears even date with the mortgage. It recites that it was given to cover any advances made or to be made to A. by C. to the amount of $100,000 or less, on condition that such advances and their payment should be indorsed thereon, as fixing the amount of indebtedness, for all of which certain premises that day conveyed by B. to C. by indenture of mortgage shall be liable. Upon the delivery of the bond and mortgage to C., B.'s note for said $50,000 was renewed, and the amount thereof indorsed on the bond as an advance of that date. The bond shows two other advances to A. of $25,000 each, for one of which a note of B. for that amount payable to his order, and duly indorsed, was delivered as collateral, and for the other a warehouse receipt for oil, given by B. to him. The receipt proved worthless, and the note was subsequently renewed. None of B.'s notes were paid, but the money advanced to A. was used for the benefit of B. *Held*, 1. That it was the debt of B. and not that of A. which was intended to be, and is, secured by the mortgage. 2. That parol evidence was admissible to show such intent.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The New York Kerosene Oil Company and the New York Guaranty and Indemnity Company were corporations organized pursuant to the laws of New York.

On the 15th of February, 1867, Abraham M. Cozzens, as the president of the Oil Company, applied to the Guaranty Company for a loan of $100,000. The sum of $50,000 was advanced to him, and he thereupon delivered to the Guaranty Company the note of the Oil Company for that amount, of the date above

mentioned, payable to and indorsed by A. M. Cozzens & Co., and having sixty days to run. At the same time he gave to the Guaranty Company a memorandum signed by him as such president, whereby he stipulated that he would cause to be prepared a mortgage by the Oil Company to the Guaranty Company on the real estate of the former therein mentioned, for the sum of $100,000, to be held by the latter as security for the $50,000 so lent, and for any further loan thereafter made by the Guaranty Company to the Oil Company. Cozzens thereupon procured a formal order to be made by the trustees of the Oil Company that such a mortgage should be executed, and the written consent of the holder of more than two-thirds of the stock of the Oil Company was given to the same effect. Both were necessary to the validity of the mortgage.

The capital stock of the Oil Company was $500,000, and Cozzens owned of it $493,000.

Passing by some intermediate details not necessary to be particularly stated, Cozzens caused to be prepared the bond and mortgage here in question, and both were duly executed. The counsel who prepared them made the mortgage describe the individual obligation of Cozzens as the liability to be secured instead of the debt of the company; but the mortgage recited that the Oil Company had authorized the giving of the mortgage to secure a loan of $100,000, and that Cozzens had given to the Guaranty Company his personal bond in that sum to secure advances, not to exceed that sum, to be made to Cozzens, upon the conditions in the bond mentioned, and that the requisite consent of stockholders had been given. The mortgage was conditioned for the payment by the Oil Company, and not by Cozzens, of the amount that might be due upon the instrument secured by it. The bond is set out at length in the record. It states that it was given to cover any advances then made or thereafter to be made by the Guaranty Company to Cozzens to the amount of $100,000 or less, on the condition that whenever any sum was so advanced the amount and date of the advance should be indorsed on the bond and signed by Cozzens, and that when any payment was made by Cozzens such payment should be indorsed in like manner, and that the amount which, according to the indorsements, should appear to be due on the

bond should be considered as the amount due, "and for which the premises which have this day been conveyed to the said New York Guaranty and Indemnity Company, by the New York Kerosene Oil Company, by indenture of mortgage bearing even date herewith, shall be liable, and for no greater sum."

The mortgage and bond bear date on the 29th of April, 1867, but were delivered and took effect on the 11th of May following. The indorsements on the bond show that Cozzens received from the obligee three several advances, — one of $50,000, and two of $25,000 each. No credits are indorsed. The note of the Oil Company, indorsed and delivered to the Guaranty Company on the 15th of February previous, when the first loan of $50,000 was made, was renewed when the bond and mortgage were delivered, and the amount was indorsed on the bond as an advance of that date. It was renewed several times subsequently, and the Guaranty Company holds the last renewal. When one of the advances of $25,000 was made, a note of the Oil Company for that amount to Cozzens & Co. was indorsed and delivered as collateral. That note was also renewed from time to time, and the last renewal is held by the Guaranty Company.

When the other advance of $25,000 was made, a warehouse receipt for oil, given by the Oil Company to Cozzens, was indorsed and delivered as a collateral. The receipt proved worthless. Nothing was ever received upon it. It is not controverted that the Oil Company owed Cozzens more than $100,000 for his advances to it, nor that every dollar of the loans in question were used for its benefit. Not the slightest taint of dishonesty is shown in these transactions, nor is any thing disclosed which warrants the suspicion of such a purpose.

The Oil Company was expressly authorized by the act under which it was organized to secure the payment of its debts theretofore or thereafter "contracted by it in the business for which it was incorporated, by mortgaging any or all real estate of such corporation," and it was declared that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate."

In March, 1868, Cozzens and the Oil Company became insol-

vent. Their paper went to protest. The business of the latter for the time was ruinous, and both were engulfed in the vortex of common disasters. Cozzens died about a week afterwards. "His death was caused by his failure. His physician said so." The unsecured creditors attacked the validity of the mortgage. The Circuit Court sustained it, and the controversy has been brought here for review.

Mr. Benjamin F. Tracy for the appellant.

Mr. George F. Comstock and *Mr. William Allen Butler*, *contra.*

MR. JUSTICE SWAYNE, after making the foregoing statement, delivered the opinion of the court.

The analysis of this case in the preceding statement divests it of all extraneous considerations, and presents it in the nakedness and simplicity of its material facts.

The central and controlling questions to be determined are:—

Whether the Oil Company had the power to give a mortgage for future advances; and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Company or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the Circuit Court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind.

The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp. 69, 76, 78, 108; Angell & Ames, sect. 145; 2 Kent, Com. 282; *Reynolds* v. *Commissioners of Stark County*,

5 Ohio, 204; *White Water Valley Canal Co.* v. *Vallette*, 21 How. 414.

A mortgage for future advances was recognized as valid by the common law. *Gardner* v. *Graham*, 7 Vin. Abr. 22, pl. 3. See also *Brinkerhoff* v. *Marvin*, 5 Johns. (N. Y.) Ch. 320; *Lawrence* v. *Tucker*, 23 How. 14.

It is believed they are held valid throughout the United States, except where forbidden by the local law.

The statute under which the Oil Company came into existence made it "capable in law of purchasing, holding, and conveying any real and personal estate, whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the later act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law. *The People* v. *Utica Insurance Co.*, 15 Johns. (N. Y.) 357; *United States*, v. *Babbit*, 1 Black, 55.

The view of the court in *Thompson* v. *New York & Hudson River Railroad Co.* (3 Sandf. (N. Y.) Ch. 625) was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This

may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same, whether the transaction took one form or the other. According to our construction the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the State. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. *Sumner* v. *Hicks*, 2 Black, 532. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the State. As to all other parties, it must be held valid, and may be enforced accordingly. *Silver Lake Bank* v. *North*, 4 Johns. (N. Y.) Ch. 370; *National Bank* v. *Matthews*, 98 U. S. 621. In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. *Gordon* v. *Preston*, 1 Watts (Pa.), 385.

Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. *In re Cork & Youghal Railway Co.*, Law Rep. 4 Ch. 748.

A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall* v. *Vicksburg*, 15 Wall. 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis* v. *Lyons*, 13 Ill. 117.

The second point to be considered is whether the mortgage was for the debt of Cozzens or for the debt of the Oil Company.

Cozzens occupied a twofold relation to the latter. He owned all the stock but a trifle, and was the president of the company. At the same time he was largely its creditor. When he applied to the Guaranty Company, he appeared in his official character, and proposed a present loan to the Oil Company of $50,000 upon its note, and further advances thereafter to the amount of $50,000, making in the aggregate the sum of $100,000, the whole to be secured by a mortgage from the company upon all its real estate.

This offer was accepted. The proposition as to the mortgage was in writing, and signed by Cozzens as president. It men-

tioned a loan of $50,000 as already made to the Oil Company, and spoke of "any future loan you may make to our company," as the liabilities to be secured.

Let us pause for a moment and consider the position of the parties at this point of time. So far, all that had been done and all that had been proposed and agreed to be done was in form and substance solely for the Oil Company. Nothing had been done or proposed for Cozzens individually. There is no ground for the allegation or suspicion that the transaction was in aught otherwise than as we have stated it. It is true the Guaranty Company held the indorsement, not of Cozzens, but of Cozzens & Co. on the note of the Oil Company for $50,000. But the Oil Company was primarily liable. Cozzens & Co. were responsible as indorsers and sureties, and were liable to be called upon only in the event of the default of the principal debtor. Until that occurred, they could not be required to respond; and in that contingency they would have been liable as any other sureties are under the same circumstances. The Oil Company was the principal debtor.

When the agreement between the Oil Company and the Guaranty Company came to be carried out, the scrivener by whom the papers were prepared without the request or knowledge of the Guaranty Company, described in the mortgage the penal bond of Cozzens as the thing to be secured, but the mortgage recited that the president had been authorized to make the loan and to execute the mortgage to secure its payment, and that the requisite consent of the stockholders had been given, and the condition of the mortgage was that the Oil Company, and not Cozzens, should pay whatever might become due upon the bond. It is true that Cozzens covenanted personally in the mortgage to pay, while there was no such covenant on the part of the company.

The first indorsement upon the bond was made upon the renewal of the company's note of $50,000, held by the Guaranty Company. One of those of $25,000 was for that amount advanced upon the note of the Oil Company for the like sum. The remaining indorsement was for that amount advanced upon a warehouse receipt for oil given by the company to Cozzens and by him transferred to the Guaranty Company.

All the moneys thus advanced were applied exclusively for the benefit of the Oil Company.

There can be no question as to the first indorsement on the bond of $50,000 being the debt of the mortgagor. It was the same debt which subsisted when the first note was delivered to the Guaranty Company, and the character of the debt was not changed by the renewal of the note and the indorsement on the bond then made.

If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid. Changes in the form of the instrument are immaterial. Equity regards only the substance of things, and deals with human affairs upon that principle. The same state of things in effect occurred with respect to each of the other sums advanced by the Guaranty Company. The note and warehouse receipt given for them were the note and receipt of the Oil Company, and it was responsible accordingly. Its needs were the motive, and were at the foundation of every loan that was made; and whether Cozzens acted as its agent in making them, or transferred the securities as a creditor acting for himself, is quite immaterial. The result is inevitably the same. In either case the Oil Company became directly liable upon the securities, and to that amount, the principal debtor to the mortgagee.

The condition of the mortgage being that the company should pay and not that Cozzens should, it could not be broken without the company's default. Until that occurred, there could be no remedy upon it either by foreclosure or ejectment. If Cozzens made default, no such consequence would follow. He could be sued on his covenant, but the rights and remedies of the mortgagee with respect to the mortgaged premises would be neither more nor less on that account. The covenant of Cozzens was collateral to the liability of the company. No such covenant was needed from the Oil Company, because the mortgage pledged its entire real estate, and the mortgagee held in addition a direct liability for each advance upon which a judgment at law could be taken. As before remarked, there could be no breach of the condition of the mortgage without the default of the Oil Company; and if it

had paid the amount due that would have extinguished the collateral liability of Cozzens and of Cozzens & Co., and if the tender had been refused, it would have extinguished the mortgage, though not the debt. *Kortright* v. *Cady*, 21 N. Y. 343.

In all that Cozzens did he acted as the agent of the Oil Company, and it would involve an utter perversion of the facts to hold that he and not that company was the principal debtor to the Guaranty Company.

We are satisfied beyond a doubt that it was the debt of the Oil Company and not his debt that was intended to be secured and was secured by the mortgage.

In examining this point, it was proper to consider all the evidence in the record. This was objected to by the counsel for the appellant. He insisted that the scope of our view must be limited to the face of the mortgage and the obligation secured by it.

It is common learning in the law that parol evidence is admissible to show that a deed absolute on its face is a mortgage, to establish a resulting trust, to show that a written contract was without consideration, that it was void for fraud, illegality, or the disability of a party, that it was modified as to the time, place, or manner of performance or otherwise, or that it was mutually agreed to be abandoned; also to show the situation of the parties and the surrounding circumstances when it was entered into and to apply it to its subject, to show that a joint obligor or maker of a note was a surety, and that the acceptor or indorser of a bill or the maker or indorser of a note became such for the accommodation of the plaintiff. Where a party has entered into a written contract, it may be so shown that he did it as the agent of another, though the agency was concealed and the principal not disclosed, and the principal, in such case, may be held liable upon it. A mortgage or a judgment may be assigned by parol.

These are but a small part of the functions which such evidence is permitted to perform.

In no class of cases is it admitted with greater latitude and effect than in that to which the one here in hand belongs.

In *Shirras* v. *Caig & Mitchell* (7 Cranch, 34), Mr. Chief Jus-

tice Marshall said: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount."

After remarking that such an instrument was liable to suspicion, he proceeds: —

"But if, on investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured by the misrepresentation. That cannot have happened in the present case."[1]

The decree of the court was that the mortgagees were entitled to have the mortgaged premises sold, "and to apply the proceeds of said sale to the payment of what remains unsatisfied of their respective debts," &c.

In *Gordon* v. *Preston* (*supra*), it appeared that the mortgage was for a greater amount than was owing to the mortgagee. Chief Justice Gibson said the mortgage was good "for the sum actually due." He said further: "But the mortgage was in fact given for the benefit of other creditors, whose debts are not disputed, and though the trust is not expressed in the instrument, *evidence was proper to explain the true nature of the transaction and negative any imputation of actual fraud.*"

In *Hurd et al.* v. *Robinson et al.* (11 Ohio St. 232), the condition of the mortgage was: "Provided always, and these presents are upon the condition, that whereas the said Robinson is indebted to said bank for money loaned, and for divers bills of exchange and promissory notes, now if the said Robinson shall discharge his said several liabilities in six months from this date, these presents shall be void, otherwise, to remain in full force and virtue." The condition was held to be sufficiently definite, and the mortgage was sustained. The opinion of the court is able and elaborate. *Gill* v. *Pinney* (12 id. 38) is to the same effect.

Other like cases might be multiplied to an indefinite extent. It is unnecessary to incumber this opinion with further references. The grounds upon which they proceed are, that a thing is to be regarded as certain which can be made certain; that evidence can be adduced to apply the contract to its subject; that where there is enough to put those concerned upon inquiry, the means of knowledge and knowledge itself are, in legal effect, the same thing.

A *multo fortiori* was it proper to receive the evidence referred to in the present case.

See, in this connection, also, *Chester and Others* v. *The Bank of Kingston*, 16 N. Y. 336, and *Horn* v. *Keteltas*, 46 id. 605.

Decree affirmed.

LUMBER COMPANY *v.* BUCHTEL.

1. A. contracted to sell B. a tract of pine land at a stipulated sum, payable in future instalments, a conveyance to be made only upon payment of the several sums as they became due, the cutting or removal of the timber being in the mean time prohibited without the written permission of A. Two days afterwards B. assigned the contract to C. A. assented to the assignment, and gave C. permission to enter the lands and cut and remove the timber, in consideration whereof the latter guaranteed the payments stipulated in the contract. The first instalment due not having been paid, A. brought suit against C. upon the guaranty. The latter set up the defence that he was induced to enter into the undertaking by the false and fraudulent representation of A. as to the quantity of good merchantable timber contained in the tract. The case was, by stipulation of the parties, tried before a referee, who reported that the representations were made by an agent of B., and that he did "not find" that A. participated therein. *Held*, 1. That A.'s grant of permission to C. to cut and remove the timber was the release of an important security to him against possible loss if payment were not made on the contract, and that the guaranty was a reasonable exaction from C. therefor. 2. That said representations not coming from A., nor relating to the permission to cut and remove the timber, did not release C. from liability on the guaranty.
2. The objection cannot be made for the first time in this court, that the report of the referee finds certain facts inferentially and not directly.
3. *Semble*, that the finding of a referee should have the precision of a special verdict, specifying with distinctness the facts, and not leaving them to be inferred.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. Emery A. Storrs for the plaintiff in error.

Mr. Mitchell J. Smiley, *Mr. O. H. Simonds*, and *Mr. N. A. Fletcher*, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 23d of September, 1874, William Buchtel, the plaintiff in the court below, the defendant in error here, contracted to sell to the Big Rapids Improvement and Manufacturing Company, a corporation created under the laws of Michigan, several hundred acres of pine land in that State for the sum of $12,273.84, payable as follows: $3,068.46 on the first of the following January, and the balance in three equal annual instalments, with interest. Nothing was paid by the company at the time, and the contract provided for the execution of a conveyance to it only upon the payment of the sums stipulated as they became due, and it prohibited in the mean time the cutting or removal of the timber without the written permission of the vendor.

Two days after its execution, the contract was assigned in writing by the Improvement and Manufacturing Company to the defendant, the Mason Lumber Company, also a corporation of Michigan. To this assignment the vendor assented, and gave permission to the Lumber Company to enter upon the lands and cut and remove the timber; and in consideration of this permission, that company guaranteed the payments stipulated in the contract. In the negotiation which resulted in the execution of the guaranty, the Improvement and Manufacturing Company was represented by its vice-president, Mr. Bronson; and the Lumber Company by its president, Mr. Mason.

The payment due on the first of January, 1875, not having been made, the present action was brought by the vendor, Buchtel, upon the guaranty, against the Lumber Company. The company pleaded the general issue, and gave notice that it would give in evidence, and insist as a defence to the action, that it was induced to enter into the undertaking by the false and fraudulent representation of the plaintiff that the lands

contained 5,700,000 feet of good merchantable pine timber; whereas, in fact, there were only 1,500,000 feet of such timber on the land, and that thereby it had sustained damages to the amount of $20,000, which it would recoup against the claim of the plaintiff and ask to have the balance certified in its favor.

By the law of Michigan, damages, whether liquidated or not, claimed by a defendant as arising out of the contract or transaction upon which an action is brought, may be set up by way of recoupment against the demand of the plaintiff; and, if found to exceed such demand, the defendant can have judgment for the balance. The case was, by stipulation of parties, tried before a referee, who reported in favor of the plaintiff for the amount claimed, with interest. He also found, as a matter of fact, that Bronson, who acted for the Improvement and Manufacturing Company in the transaction in which the assignment and guaranty were made, exhibited at the time to Mason, who acted for the Lumber Company, a plat of the lands in the presence of the plaintiff, and represented that they contained 5,000,000 feet of good merchantable pine timber; whereas, as a matter of fact, they contained only 1,237,197 feet of such timber; but that there was a large quantity of additional timber which was poor, the defects of which could not be discovered until after it was cut. He further found that the plaintiff had never seen the lands, and that the Lumber Company was aware of the fact; and that all the knowledge he had of the quantity of the timber was derived from an estimate furnished to him by his grantor. The referee also states in his report that "he does not find" that the plaintiff's attention was called to the plat exhibited, or that he made any representations in relation to the quantity of timber on the land, or that he had any knowledge of the quantity at the time, or that the estimate furnished to him by his grantor was before him, or that he alluded to it, or that the representations of Bronson to Mason as to the quantity of the timber were made in his hearing. Exceptions were taken to the report, and overruled by the court below.

The only questions presented by the record which merit consideration are, —

1st, Whether the false and fraudulent representations —

assuming that they were fraudulent as well as false — of the agent of the Improvement and Manufacturing Company to the agent of the Lumber Company, as to the quantity of timber on the lands purchased, in which representations the plaintiff did not participate, released the defendant from liability on its guaranty; and,

2d, Whether the report of the referee is fatally defective because it finds certain facts inferentially and not directly.

Neither of the questions thus raised is at all difficult of solution. The contract of guaranty of the Lumber Company was executed to the plaintiff as a consideration for his permission to enter upon the land and cut and remove the timber in advance of the stipulated payments. The provision against the cutting or removal of the timber, without such consent, was a most important one to him. It secured him against a possible loss if the payments were not made. The granting of permission to the Lumber Company was releasing that security, and giving to the company the principal value of the property in advance of payment. The guaranty was a reasonable exaction for it. The representations of the Improvement Company, through its officers, to the officers of the Lumber Company, as to the supposed amount of timber on the land, to induce the latter to execute the guaranty and thus obtain the permission of the plaintiff, cannot be allowed to mar or defeat the contract with him, as he knew nothing of their being made, and was ignorant of the subject to which they related. It was the same thing to him whether insufficient or adequate consideration passed between the two companies. He gave to the Lumber Company a valuable consideration for the guaranty, and has, therefore, a right to hold that company to the liabilities it assumed.

The cases cited by counsel to show that a misrepresentation of material facts inducing a contract, though made in ignorance, may, in many cases, be the foundation of a suit for its cancellation or modification, have no bearing on the questions here presented. They apply only where the contract, of which a rescission or modification is sought, was obtained by the party claiming its benefit, and the misrepresentations related to the consideration given for it.

Thus, in the first case cited, that of *Smith* v. *Richards*, reported in the 13th Peters, the misrepresentation related to land containing a gold-mine, and was made by the owner to the vendee to induce its purchase by him. And so it will be found in all the other cases cited, that the misrepresentations came from the party holding the contract complained of, and related to the consideration upon which it was executed.

In the case before us neither of these particulars exists. The misrepresentations alleged did not come from the plaintiff, the holder of the contract, nor relate to the permission given to cut and remove the timber. Neither as to the nature or value of his reserved right to withhold such permission were any representations made by him, nor could there have been any misapprehension of the nature and extent of the guaranty assumed. Whatever related to other matters which took place between the two companies was unknown to him and in no way concerned him.

The report of the referee is undoubtedly defective in the form in which the statement is made of the plaintiff's want of knowledge as to the misrepresentations of the officers of the Improvement Company. The findings should have the precision of a special verdict, and specify with distinctness the facts found, and not leave them to be inferred. "I do not find" that the plaintiff knew certain facts, is a defective statement, and ought not to be received as equivalent to a direct finding that the plaintiff did not know the facts mentioned; although it is probable that the referee intended it to have that meaning. But defects of this character in the finding should have been called to the attention of the court below, and a more definite finding required of the referee. They cannot be considered here for the first time. It was for the defendant to see that findings were had on all matters material to its defence, as it was for the plaintiff to see that findings were sufficient to support the judgment in his favor.

Judgment affirmed.

LUMBER COMPANY v. BUCHTEL.

In a suit against B. upon his contract guaranteeing the payment of the purchase-money of certain land, A. recovered judgment for the first instalment. In a subsequent suit for the remaining ones, B. set up the same defence as in the first suit, that the contract was induced by the fraudulent representations of A. as to the quantity of timber on the land, and he moreover alleged that they amounted to a warranty, upon the breach of which he was entitled to recoup the damages sustained. *Held*, that the judgment, having been rendered upon the finding of a referee that such representations were not made, is conclusive, as to the facts found, in all subsequent controversies between the parties on the contract.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. Emery A. Storrs for the plaintiff in error.

Mr. Mitchell J. Smiley, *Mr. O. H. Simonds*, and *Mr. N. A. Fletcher*, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

In the preceding case between these parties we affirmed the judgment of the court below recovered for the first instalment of money due upon the contract of purchase of certain timber lands in Michigan, the payment of which had been guaranteed by the defendant below, the Lumber Company. The present action was for the remaining instalments of the purchase-money.

To the first action the defendant set up that it was induced to make the contract of guaranty by certain false and fraudulent representations of the plaintiff as to the quantity of merchantable timber on the land. To the present action it sets up the same defence, and also that the representation made as to the quantity of timber, to induce the execution of the contract, amounted to a warranty, upon breach of which it was entitled to recoup the damages sustained. To meet these defences the plaintiff produced the judgment in the former case; and the question presented for determination is, whether that judgment was conclusive.

As to the first defence there can be no doubt that such must be the effect of the judgment. The case was between the same parties for the first instalment on the contract guaranteed, and

a recovery was there resisted upon precisely the same ground here urged.

The extent and effect of a former recovery between the same parties upon the same question raised in a new action have been so often considered and determined by this court, that it would be a waste of time to go over the argument and repeat our views on the subject. Our latest expression of opinion, made after deliberate consideration, is found in the case of *Cromwell* v. *County of Sac*, 94 U. S. 351. To the reasons there adduced we have nothing to add. And we are of opinion that the second defence is also concluded by the former adjudication. The finding of the referee, upon which the judgment was rendered — and this finding, like the verdict of a jury, constitutes an essential part of the record of the case — shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff or in his hearing to induce the execution of the contract of guaranty. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defence requiring the negation of this fact is met and overthrown by that adjudication.

Judgment affirmed.

RAILWAY COMPANY *v.* UNITED STATES.

Where, by the terms of a decree rendered in its favor against a railway company, the United States was entitled to an execution thereon for a certain sum of money, and B., another company, the successor of A. and representative of its interests and assets, by petition prayed that an alleged indebtedness of the United States to B., contracted since the rendition of the decree, be applied in payment of that sum, — *Held*, that inasmuch as the claim of B. does not arise out of the decree, and the United States is not liable to suit thereon, except in the Court of Claims, B. is not entitled to the relief prayed for.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The facts are stated in the opinion of the court.

Mr. James E. Bailey for the appellant.

The Attorney-General and *Mr. Edwin B. Smith*, Assistant Attorney-General, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 10th of November, 1871, the United States recovered a decree in an equity suit in the court below against the Nashville and Chattanooga Railroad Company, for $1,000,000, to be paid one-half in ten years, and one-half in twenty years, with interest semi-annually at the rate of four per cent per annum. By an arrangement between the parties, bonds with coupons attached were issued by the company to represent the amounts thus to be paid, and it was provided in the decree that if the company should "make default for the period of ninety days in the payment of any of the instalments of interest or of principal of said debt, or any part thereof, after the same shall have become due and payable, according to the tenor and effect of said bonds and coupons, then the United States, on filing with the clerk of the court any of said coupons or bonds, past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default by the sale of the railroad," &c. Default having been made in the payment of fifty-seven coupons, of $100 each, representing a part of the semi-annual interest on the bonds so issued, the United States, on the 12th of June, 1876, filed the coupons in the clerk's office, and asked for execution of the decree to that extent. Thereupon the Nashville, Chattanooga, and St. Louis Railroad Company, the successor of the original defendant company, and representing its debts and assets, appeared, and, by petition, asked that a debt which the United States owed the petitioning company for services performed in military transportation and carrying the mails since the date of the decree, might be applied to the payment and cancellation of the coupons in default and on file. From the petition itself it appears that the United States refused to make the application because of an alleged defence they had to the claim, and the evident purpose of the company is to have the validity of that defence determined in this proceeding.

In our opinion the court below properly declined to entertain the petition. The claim of the railroad company does not arise out of the decree. There is no connection between the demand of the United States on the one side and that of the railroad

company on the other. The United States ask for no new decree, but execution because of default in the payment of an old one. Upon their application the only question is whether there has been default for the requisite time in the payment of the coupons filed. The railroad company admits the default, but insists, in effect, that the United States ought to apply the coupons to the payment of a debt they owe the company, and thus cancel the default. This the United States decline to do, because they claim they do not owe the debt set up by the company. Clearly this dispute between the parties could not, even before final decree, be made the subject of a cross-bill, because it does not grow out of the original suit. A cross-bill cannot be used to bring in new and distinct matters. *Ayers* v. *Chicago*, *supra*, p. 184; *Rubber Company* v. *Goodyear*, 9 Wall. 788; *Cross* v. *De Valle*, 1 id. 5. Neither can the petition be treated as an original and independent suit, for the United States cannot be sued on contracts except in the Court of Claims. If the United States had sued the railroad company on the coupons, other questions might have arisen; but they did not do so. All they have done has been to file their coupons with the clerk in order to get execution on their old decree.

Decree affirmed.

KENNEDY v. CRESWELL.

A bill filed by A. for himself and other creditors against B., executor of C., and the devisees of the latter, alleged that C. was indebted to him, that the personal assets were insufficient to pay the debts, and that B. was paying some of them in full and leaving others unsatisfied. It prayed for an account of the personal estate, the application thereof to the payment of the debt, and the discovery of the real estate whereof C. died seised. The defendants pleaded in bar that B. had in his hands assets sufficient to pay A.'s claim and all others. To this plea A. filed a replication. The proofs sustained the allegations of the bill, but showed those of the plea to be untrue. *Held*, 1. That A. was entitled to a decree as though the bill had been confessed or admitted. 2. That as by reason of B.'s admission of assets no discovery was required, a decree against him rendering him individually liable was proper. 3. That there is nothing in the local law of the District of Columbia or in the jurisdiction of the Supreme Court of said District, sitting as a probate court, inconsistent with these rulings.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Martin F. Morris* for the appellant.

Mr. Enoch Totten, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The appellees filed a bill in equity for themselves and other creditors against the executor and the devisees of the will of James C. Kennedy, deceased, praying for an account of the personal estate of the testator, a discovery of his real estate, and the application thereof to the payment of his debts. The bill stated that the complainants were the holders of a note of the testator for $12,000, with interest, which was due and not paid; that the defendant, Harvey Kennedy, as executor, had proved the testator's will, and entered upon the execution thereof; that the personal property was insufficient to pay the debts, and that he was paying some debts in full and leaving others unsatisfied; and that the testator left a large amount of real estate, some of which is described and pointed out.

To this bill the defendants filed a plea, the material part of which is as follows: —

"That the executor aforesaid has in his hands assets of the estate of the said James C. Kennedy, deceased, amply sufficient to pay and discharge the claims of the complainants and all other claims that have been brought to his notice, and that he is ready and willing to pay the said claim of the complainants whenever and as soon as the same shall have been proved and established by a tribunal of competent jurisdiction according to law; but the said executor disputes the said claim, and denies the justice and validity thereof, and has for such cause rejected the same; and the said complainants have not sought in any manner to enforce the said claim against the said executor and the assets in his hands by proper proceedings at law:

"Wherefore, these defendants aver and plead the premises in bar of the complainants' bill; and they pray that the complainants be required to enforce their claim against the said

executor by proper proceedings at law, and they pray also the judgment of the court whether they (these defendants) should be compelled to make any further or other answer to the said bill, and that they be hence dismissed with their reasonable costs in this behalf wrongfully sustained."

To this plea the complainants filed a replication, and proceeded to prove the note held by them and its non-payment, and also produced in evidence the accounts filed by the executor in the office of the register of wills and the exceptions filed by the complainants thereto. In the executor's account he charged himself with assets to the amount of $31,794.62, and claimed credit for moneys paid and for commissions to the amount of $27,014.75, showing a balance in his hands of only $4,729.87. The defendants offered no testimony, and the court on final hearing made a decree that the executor should pay to the complainants the full amount of their claim. From this decree the executor appealed.

The appellant insists that, according to the rules of equity pleading, the complainants by taking issue on the plea admitted its sufficiency; and as the decree was based upon the admission of assets contained in the plea, it was an affirmation of its truth; and therefore it should have been in favor of the defendants, and the bill should have been dismissed.

This argument is very ingenious, but it is not sound. The defendants not only failed to prove the truth of their plea, but, on the contrary, the complainants, by the executor's own sworn accounts, filed in the probate office, proved, so far as such proof could go, that the plea was untrue. These accounts show that the executor had not sufficient personal estate in his hands to pay one-third of the complainants' claim alone. So that according to the strictest rules of equity pleading the complainants were entitled to a decree in their favor. The executor may have had sufficient assets in fact; but he did not see fit to disclose them, or prove that he had them. His admission that he had assets may be taken against him for the purpose of charging him with a liability, but it cannot serve him as evidence to prove the truth of his plea. His mere allegation cannot be received as proof of its own truth where the fact is directly in issue, and the burden of proof is on him.

Since, then, the complainants were entitled to a decree, the question is, what decree? If a defendant plead a false plea, and it be so found, what is next to be done? Is it to be merely overruled, and an order made that he answer further, as in case of overruling a demurrer, or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it is found against him, claim the right to file an answer; although, if the complainant desires a discovery, which the plea sought to avoid, he may undoubtedly insist upon it. But that is the complainant's right, not the defendant's. Lord Hardwicke said: "All pleas must suggest a fact; it must go to a hearing; and if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in order to supply that." *Brownsword* v. *Edwards*, 2 Ves. 243. This statement is adopted by Lord Redesdale, Mr. Beames, and all subsequent writers on equity pleading. Mitf. (4th ed.) 302; Beames, Pleas in Equity, 318; Story, Eq. Pl., sect. 697. If the plea is found to be false, it would seem to be just and equitable that the case should stand as if the defendant had admitted the allegations of the plaintiff. Sir Thomas Plumer states the matter thus: "Supposing a plea to be correct in form, but proved false, it seems to be conceived that the course at the hearing is to take it up just as if there was no answer. That is not correct. Upon a plea found false the plaintiff is entitled to a decree; and if a discovery is wanted, the defendant is ordered to be examined upon interrogatories." *Wood* v. *Strickland*, 2 Ves. & Bea. 150. Chancellor Walworth, in a case before him, where the defendant produced no evidence to establish the truth of his plea, said: "Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If at the hearing the plea is found to be true, the bill must be dismissed. But if the plea is untrue, the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admitted. If a discovery is necessary to enable the com-

plainant to obtain the relief sought for by his bill, the defendant cannot evade answering by putting in a plea which turns out to be false. In such a case, after the plea is overruled as false, the complainant may have an order that the defendant be examined on interrogatories before a master as to the several matters in relation to which a discovery was sought by the bill." *Dows* v. *McMichael*, 2 Paige (N. Y.), 345.

In the present case, the complainants did not see fit to insist on a further discovery. Being entitled to a decree *pro confesso* as to the principal charges of their bill, and the executor having admitted sufficient assets to pay the debts of the estate, they were content to take a decree against him for the amount of the debt. The executor's admission, as we have before said, was a good ground for charging him with the liability, though he could not urge it as evidence in support of his plea. And as an admission of assets renders the executor personally liable, a decree against him was proper. The usual decree on a creditor's bill is for an account; but, as said by Vice-Chancellor Wigram in a similar case, "The reason for and the principle of the usual form of decree have no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for the payment of the plaintiff's debt; and the object of the special form of the decree in a creditor's suit fails. . . . I am satisfied that in this case there ought to be a decree for immediate payment." *Woodgate* v. *Field*, 2 Hare, 211; Story, Eq. Jur., sect. 548 *a*. Had it been contended or shown in this case that the estate of the testator was insolvent, so as to require a *pro rata* payment among all the creditors, there might have been room for the objection that the ordinary decree was not made. But no such point is made in the case, and we think that the decree was properly rendered for the debt of the complainants alone.

As to the objection that the bill was not formally dismissed as to the devisees, we do not think it can be raised here by the executor, who alone appealed from the decree.

The point taken by the appellant, that the court below, sitting as a court of equity, had no jurisdiction of the case, is not well taken. The authorities are abundant and well settled that

a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to establish the validity of his claim. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits. *Thompson* v. *Brown*, 4 Johns. (N.Y.) Ch. 619; 1 Story, Eq. Jur., sect. 546; 2 Wms. Exrs. 1718, 1719. The allegations of the bill in this case were sufficient to give the court jurisdiction; and the accounts of the executor show that the complainants had reasonable cause for making those allegations. They went into the court for the discovery of assets; and the object of the bill was attained by the admission of the executor that he had sufficient assets. It would be strange indeed if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect; and the result would be that a bill in equity could be defeated by proofs showing that there was good ground for filing it.

In conclusion, we will state that we have found nothing in the local law of the District of Columbia, or the jurisdiction of the Probate Court, that is, of the Supreme Court of the District acting as such, inconsistent with the views expressed.

Decree affirmed.

IMHAEUSER v. BUERK.

1. Letters-patent for a combination of old ingredients are infringed by substituting for one of its elements a mechanical equivalent which was well known to be such when they were granted.
2. Letters-patent No. 48,048, granted June 6, 1865, to Jacob E. Buerk for an improvement in watchman's time detectors, are valid, and are infringed by letters-patent No. 117,442, granted July 25, 1871, to Anton Meyer for an improvement in watchman's time checks.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This is a suit, commenced July 5, 1872, by Jacob E. Buerk against William Imhaeuser, Theodore Hahn, and Charles Keinath doing business as Imhaeuser & Co., for the alleged infringement by them of letters-patent No. 48,048, granted to him June 6, 1865, for an improvement in watchman's time detectors.

The drawings and specification of his letters are as follows: —

Fig. 1.

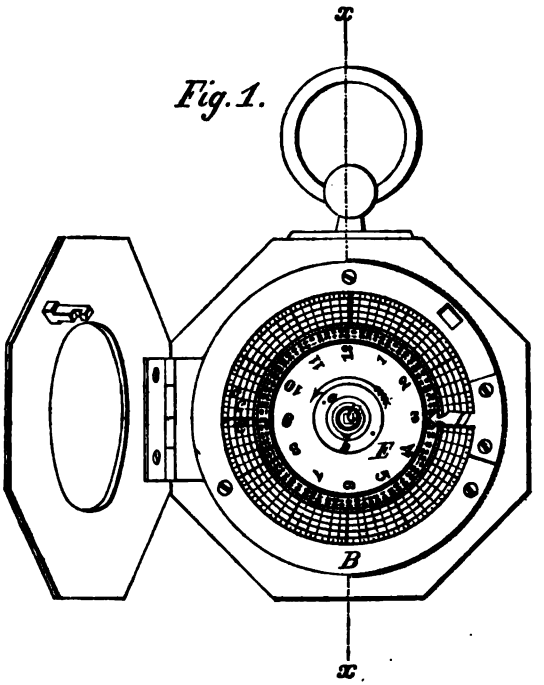


Fig 2.

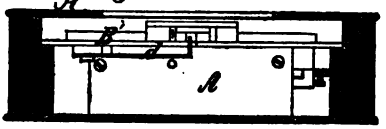


Fig. 3.

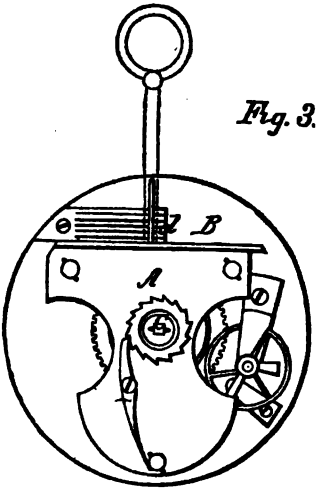


Fig. 4.

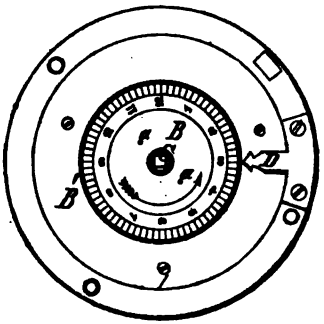
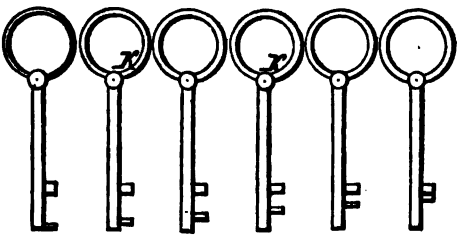


Fig. 5.



" No. 48,048.

" *The Schedule referred to in these Letters-patent and making part of the same.*

" *To all whom it may concern:*

" Be it known that I, Jacob E. Buerk, of Boston, in the county of Suffolk and State of Massachusetts, have invented a new and improved watchman's time detector, and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, ref-

erence being had to the accompanying drawings forming a part of this specification, in which, —

"Figure 1 represents a face view of this invention.

"Figure 2 is a vertical central section of the same, the line x x, Figure 1, indicating the plane of section.

"Figure 3 is an inverted plan of the movement.

"Figure 4 is a face view of the same.

"Figure 5 is a diagram representing the keys necessary for the operation of this invention.

"Similar letters of reference indicate like parts.

"This invention relates to an improvement in that class of watchman's time detectors on which a patent has been granted to John Buerk, Jan. 1, 1861. In that case a strip of paper is used stretched on the circumference of a drum to which a rotary motion is imparted by a clock or watch movement, and a series of spring points serve to perforate this strip according to the time when these points are operated by a series of keys of peculiar shape. On the strip are marked the hours, corresponding to hours on the dial of the clock or watch, and the time when one or more of the spring points have been actuated can be ascertained after the strip has been taken off. This construction necessitates a drum in addition to the ordinary clock or watch movement, whereby the expense of the mechanism is increased, and, furthermore, the operation of applying and removing the strips of paper is tiresome and requires much care.

"These difficulties are avoided by using a clock or watch with a stationary index and revolving dial. On this revolving dial are fastened removable dials of paper or other suitable material, with a series of circles corresponding to the positions of the spring points, and these spring points are concealed under the stationary index. By inserting one of the keys and turning the same round, the paper dial is pierced by one or more of the spring points, and the time when this takes place can be ascertained by examining said dial when the watch or clock is opened. The perforations in the paper dial are made from below under the stationary hand, leaving a slight barb on the upper surface, and a similar perforation cannot be produced even if the watch or clock be opened, except if the paper dial is taken off.

"A represents a clock or watch movement made in the ordinary manner, and provided with a revolving dial, B, which is mounted on the centre shaft, C, in place of the ordinary hands, and

which rotates under the stationary index, *D*. The dial is marked with figures from 1 to 12, and it revolves once in twelve hours. From this dial project two or more points, *a*, which serve to retain a false dial, *E*, of paper or other suitable material, and this dial is held in place by a disk, *b*, which slips over the centre shaft, and which is provided with little holes or sockets to correspond in number and position to the points *a*. The paper dial, *E*, is marked with figures from 1 to 12, like the main dial, and with a series of concentric rings, *c*, corresponding in number to the stations in the beat. The paper dial shown in the drawing is marked with six rings, to correspond to six different stations.

"The spaces between the rings, *c*, correspond in number and position to a series of spring points, *d*, the points of which are situated under the index *D*, and made to project through a slot in the dial-plate *B'*. When left to follow their own elasticity, said spring points do not reach above the surface of the dial-plate, but they are so arranged that one or more of them can be forced up simultaneously and made to penetrate the paper dial, different keys, *K*, being provided, each of which serves to raise one of said spring points, or of a combination of two or more of them.

"One of the keys is intended to be fastened by a chain or other suitable means to a post or other fixed part on each station in the beat of the watchman, and the watchman carries the watch. On arriving at a station he inserts the key, and by turning the same a perforation is produced which gives a record of the time when the watchman has visited the station. The watch, of course, is intended to be locked, so that the watchman cannot get at the paper dial in order to produce fraudulent perforations to cover a neglect of his duty, and the keys, simple as they look, are so shaped that they cannot easily be imitated, for the slightest difference in the height or position of the bit would produce a different action.

"Having thus described my invention,

"I claim as new and desire to secure by letters-patent, —

"1st, The use of a false revolving dial, *E*, in combination with the stationary index, *D*, and spring points, *d*, constructed and operating substantially and for the purpose set forth.

"2d, Producing the perforations on the paper dial, or its equivalent, from the inside out instead of from the outside in, as before."

The bill was taken as confessed against Keinath. Imhaeuser and Hahn filed an answer denying the infringement and setting up that the indicators manufactured by them were made under letters-patent No. 117,442, granted July 25, 1871, to Anton Meyer, of Stuttgart, Germany, for an improvement in watchman's time checks; and that the complainant's letters are void for want of novelty, the invention therein claimed having been anticipated by a French patent granted to one Nolet in 1847; another granted in the same year to one Schwilgue; English letters No. 957, granted in 1852 to John Rowbotham; English letters No. 1431, granted in 1862 to Thomas Buckney; and in a German work by Emanuel Schreiber, entitled, "Dr. Friedrich Wilhelm Barfuss's Geschechte der Uhrmacher Kunst von den ältester Zeiten bis auf unsere Tage," published in the year 1856 by Bernh. Friedr. Voeght, in Weimar, Germany.

The drawings and specification of Meyer's letters are as follows: —

Fig. 1.

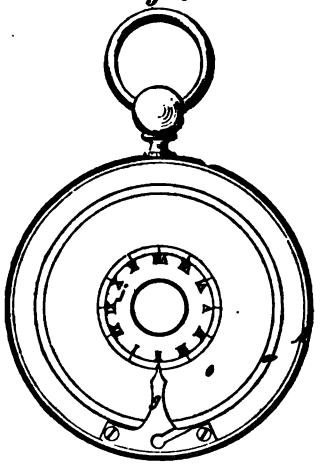


Fig. 2.

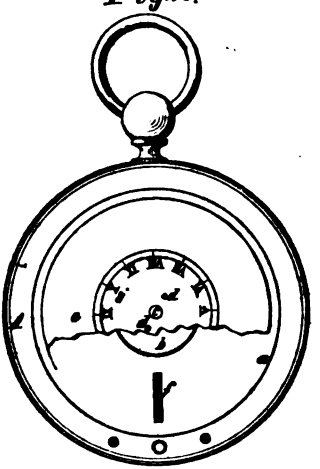


Fig. 3

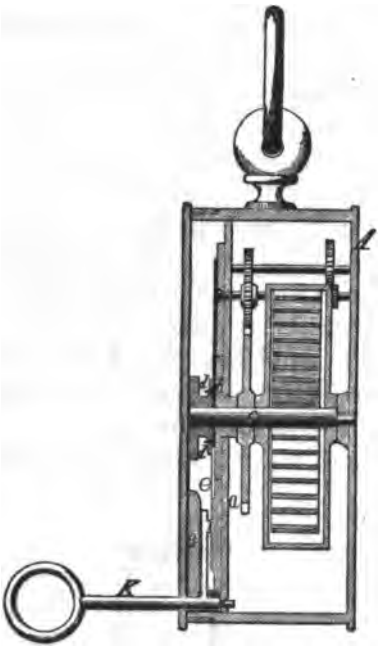
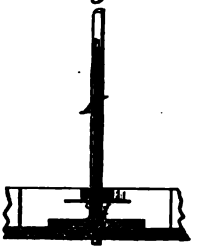


Fig. 4.



"*Specification forming part of Letters-patent No.* 117,442, *dated July* 25, 1871.

"*To all whom it may concern:*

"Be it known that I, Anton Meyer, of Stuttgart, in the empire of Germany, have invented a new and useful improvement in watchman's time detectors; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification, in which drawing—

"Figure 1 represents a face view of this invention. Fig. 2 is a similar view of the same, the dial-plate being partially broken away to expose the marking-dies. Fig. 3 is a transverse central section of the same. Fig. 4 is a detached section of the cam-shaped bridge.

"Similar letters indicate corresponding parts.

"This invention consists in the arrangement of one or more stationary marking-dies in the face-plate of a watch or clock in combi-

nation with a cam-shaped bridge extending over the marking-die or dies, and with one or more keys, the bit or bits of which correspond in position to the marking die or dies in such a manner that, by affixing a disk of paper or other suitable material to the movable dial-plate of the watch or clock, and causing said disk to revolve between the stationary marking die or dies and the cam-shaped bridge, the key or keys, on being introduced into the watch or clock-case and turned in the proper direction under the cam-shaped bridge, will depress the paper or other material on the marking-die corresponding to the position of its bit, and the exact time when the watchman has visited a certain room or station on his beat will be recorded on the disk of paper or other material.

"In the drawing, *A* designates the case of a watch or clock, in which is firmly secured a stationary face-plate, *a*, the central part of which is cut out to make room for a disk, *b*, which is secured to an arbor, *c*. This arbor connects by suitable gear with the clock-movement, and it revolves once in twelve hours. The surface of the disk *b* is flush with the surface of the stationary face-plate *a*, and it is provided with two or more points, *d*, so that a dial, *e*, of paper or other suitable material can be readily attached to it, and that, when such dial is placed on the disk, it will be compelled to follow the motion of the same. From the face-plate *a* project one or more stationary dies, *f*, the faces of which have engraved or otherwise produced in them figures, letters, or other suitable characters, and which, when more than one such die is used, are set in a radial direction, as shown in Fig. 2 of the drawing. These dies are situated beneath a bridge, *g*, which is firmly secured to the case *a*, and which is perforated with a hole, *h*, to receive the key *K*. The under surface of the bridge is cam-shaped, as shown in Fig. 4, and the upper surface of the key is rounded, so that, when the key is inserted into the key-hole and turned round under the bridge, the projection *i* on said key will be depressed toward the die, and the dial, *e*, which is carried through between the dies and the bridge, will receive an impression to correspond to the face of the die. The position of the projection *i* on the key, of course, must correspond to the position of the die, and if more than one die is used several keys have to be prepared, one for each die. These keys are intended to be secured in the various rooms or stations composing the beat of the watchman, the watchman carrying the clock or watch, the case of which is locked by a key in the possession of the superintendent or proprietor of the place. On reaching a certain station the watchman inserts the key in his clock, and, by turning it, a mark is produced

on the dial *e* indicating the station. On the dial is also marked a time-table, *j*, and the bridge *g* may serve as the index pointing on the divisions of the time-table. As the dial is carried around by the clock-movement, the time when a mark is produced on the dial by one of the keys can be read off from the time-table, and the movements of the watchman on his beat can be controlled. If the number of stations in the beat exceeds the number of the marking-dies in the clock, keys can be prepared with two or more projections, and with six marking dies a large number of stations can be controlled. If desired, the bridge *g* may be made yielding, so that its action on the key will depend not only on its cam-shaped face, but also on the action of a spring having a tendency to force said bridge in toward the marking die or dies.

"I am aware that a watchman's time detector has been heretofore made in which spring marking-points are used to indicate the different rooms or stations in the beat, such as described in the patent of J. E. Buerk, June 6, 1865. For these spring marking-points I have substituted stationary dies representing figures or letters, whereby the stations of a beat are readily recognized; and, furthermore, the stationary dies are easier made than the spring marking-points, they are less liable to get out of order, and the impressions produced by them cannot be forged without having exact counterfeits of the dies.

"I disclaim every thing shown and described in the patent of J. E. Buerk, above mentioned.

"What I claim as new, and desire to secure by letters-patent, is —

"The stationary marking die or dies, situated beneath a cam-shaped bridge, in combination with a suitable key or keys and with a dial passing through between the marking die or dies and the bridge, substantially as herein shown and described."

The court passed a decree in favor of the complainant, and granted him a perpetual injunction restraining the defendants from making, manufacturing, or causing to be manufactured, using, or vending to others to be used, watchman's time detectors embracing, containing, or using the invention described in and secured by the said letters-patent No. 48,048.

Imhaeuser thereupon appealed to this court.

Mr. Arthur v. Briesen for the appellant.

The complainant's patent is void. Mere duplication of devices is not patentable.

Invention, in the sense of the patent law, is the finding out, contriving, devising, or creating by an operation of the intellect something new and useful which did not exist before. *Ransom* v. *Mayor*, 1 Fish. Pat. Cas. 252. A contrivance which does not require the exercise of inventive power is not patentable. *The Corn-Planter Patent*, 23 Wall. 181. Enlargement of the organization of a machine does not afford any ground, in the sense of the patent law, for a patent. *Phillips* v. *Page*, 24 How. 164. The mere change of location of an old device is not patentable, if the result is the same as before. *Marsh* v. *Dodge et al.*, 6 Fish. Pat. Cas. 562. The mere transfer of a mode of constructing wooden slides and metallic slides is not invention. *Carter* v. *Messinger*, 11 Blatchf. 34. There is nothing new in the multiplication of parts. *Wilbur* v. *Beecher*, 2 id. 132.

The defendant's device does not infringe. Form, when of the essence of the invention, is necessarily material; and if it be inseparable from the successful operation of the machine, the attainment of the same object by a machine different in form is not an infringement. *Werner* v. *King*, 96 U. S. 218. Every man has the right to make an improvement in a machine and evade a previous patent, provided he does not invade the rights of the patentee. *Burr* v. *Duryee*, 1 Wall. 531; *Seymour* v. *Osborne*, 11 id. 516; *Johnson* v. *Root*, 1 Fish. Pat. Cas. 351.

Where the defendant in constructing his machine omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new or which performs a substantially different function, or, if old, was not known at the date of plaintiff's invention, as a proper substitute for the omitted ingredient, then he does not infringe. *Gould* v. *Rees*, 15 Wall. 187; *Fuller* v. *Yentzer*, 94 U. S. 288, 297; *Carver* v. *Hyde*, 16 Pet. 513; *Brooks* v. *Fiske*, 15 How. 212.

Mr. J. Van Santvoord, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the

arrangement of the parts composing the invention is new, and will produce a new and useful result.

Such a patentee may doubtless invoke the doctrine of equivalents as against an infringer of the patent: but the term "equivalent," as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine.

Pressure in a machine may be produced by a spring or by a weight; and where that is so, the one is a mechanical equivalent of the other. Cases arise also where a rod and an endless chain will produce the same effect in a machine; and where that is so, the constructor in operating under the patent may substitute the one for the other, and still claim the protection which the patent confers. Exactly the same function in certain cases may be accomplished by a lever or by a screw; and where that is so, the substitution of the one for the other cannot be regarded as invention.

Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Gill* v. *Wells*, 22 Wall. 1, 28.

Due process was issued against the present respondent and two others, to wit, Theodore Hahn and Charles Keinath, all of whom were duly served, but the respondent last named never filed an answer, and submitted to a decree *pro confesso*. Both of the other respondents appeared and jointly answered, setting up two principal defences: 1. That the complainant was not the original and first inventor of the improvement. 2. They deny in their answer that they have in any manner infringed

the patent of the complainant, or ever invaded any of his rights, as alleged in the bill of complaint.

Proofs were taken, the parties heard, and the Circuit Court having overruled both defences, sent the cause to a master to ascertain what amount the complainant was entitled to recover. Hearing was had before the master, and he made a report, as required by the decretal order. Exceptions were filed by the respondents, who were again heard before the Circuit Court in support of their motion to set aside the master's report. Modifications of an important character were made by the Circuit Court in the report of the master, both in respect to the amount adjudged to the complainant and in respect to the portions to be paid by the respective respondents, the decree being that the complainant do recover of the three respondents the sum of $1,961; and also against the first two in the sum of $3,748.28, with interest and costs, as therein specified.

Seasonable appeal was taken by the first-named respondent, and since the appeal was entered here he has filed the following assignment of errors: 1. That the Circuit Court erred in holding that the patent of the complainant is good and valid. 2. That the Circuit Court erred in holding that the respondents have infringed the claims of the complainant's patent.

Patented time detectors for watchmen were known in the art prior to the date of the patent described in the bill of complaint, and it appears that the complainant, at a certain period anterior to that date, became the owner of such a patent, and that he surrendered the same, and that it was reissued in his name for the then unexpired portion of the term. Certain alterations were made in the specification of the reissue, and, as there described, the invention provided a watch for the watchman, which he carried with him in his rounds, so constructed that, by the insertion of a key kept at each of the stations he was required to visit, he could make a record within the watch indicating the several stations visited, with the precise time of each visit, and the order in which the respective visits were made. Each watch was provided with a lock, so that the watchman had no access to its interior, and as the record of each station could only be made by the peculiar key that belonged to such station, which was there made fast, the

watchman could not deceive his employers by making a false record.

All these several functions were effected by using a watch or small portable clock movement enclosed in a strong case, the lid of which could be locked and the key kept by the employer. Like a watch it had an arbor upon which the hour-hand was placed, and a drum was attached so as to revolve as the hour-hand revolved, the purpose of which was to carry the roll of paper to receive the marks indicating the time of each visit. By marks on the paper it was divided into spaces corresponding in their position, relatively as respects the centre of the watch, to the hours and minutes of the watch dial, and by lines drawn lengthwise it was also divided into spaces corresponding in number to the number of markers to be used in effecting the patented result.

Exterior to the watch-movement, but within the case, there were placed small steel bars or springs, terminating each in a point bent at right angles, while the other end was fixed firmly to the circular plate or frame of the watch-movement. These springs were placed and held in a gang, one above another, so that the points were in a row perpendicular to the watch face, at and exterior to the point on the dial of the watch indicating the hour of twelve, and each point was directly opposite one of the longitudinal spaces in the strip of paper around the circumference of the drum.

What the inventor desired to accomplish was to show the exact time of each visit of the watchman, and it is obvious that if the point of one of the springs is pressed inward upon the revolving drum it will perforate the paper within its proper longitudinal division, and that the perforation will show the hour and minute at which it was made; and in order to permit such perforation without injuring the steel point the periphery of the drum was channelled by narrow longitudinal grooves beneath each of the spaces in the paper placed around the drum to receive the marks. Keys were also provided varying from each other in the location and width of the bit and in the number of the bits, so that when one was inserted in the key-hole contiguous to the steel spring, and turned, it would press one of the springs inward upon the paper and make the required

perforation, while another would press two springs and make two perforations, another three, and so on, as more fully set forth in the specification. *Buerk* v. *Valentine*, 9 Blatchf. 479.

Since the term of that patent expired, the complainant has obtained a patent for the invention in controversy in this case, which, as he admits, is for the same purpose as the other, but which he insists is a valuable improvement in accomplishing the purpose for which both inventions were made. In its main features the new improvement consists in dispensing with the drum entirely and the paper wound around its circumference. Instead of that it attaches a circular disk to the arbor of the hour-hand to revolve therewith, and attaches thereto a circular flat paper dial of larger diameter divided by vertical lines, corresponding with the hours and minutes of a watch dial, and having a portion of its exterior divided into spaces by circular lines drawn at uniform distances, and corresponding to the location of certain steel points as the paper disk is revolved. Beneath the circular plate forming the support or frame of the watch-movement the gang of steel bars or springs is firmly attached to the plate in such position that the points are in a straight line radial to the centre, and over each point is a hole in the plate so that each can be pushed upward, the point thereof passing through the hole sufficiently to perforate the paper dial in the space corresponding to the point of the spring. Over the row of holes is placed a small strip of metal, called a fixed index, which is fastened to the circular plate or frame of the watch, and extends towards the centre of the disk, and is raised sufficiently above the revolving disk to permit the paper dial to revolve freely under it and over the holes through which the spring-points are to rise, and to prevent injury to these points holes are made in its under surface opposite each point, into which the points as they rise may enter, and then by the power of the spring be withdrawn to their respective positions below the plate. Devices, called keys, of a like character to those used in the prior invention, are provided, to be inserted in a key-hole so located that the bit of the keys when turned will force the springs upwards instead of inwards, as in the other apparatus previously explained. Perforations are made by the combination in the exterior portion of the revolving

paper dial, which indicate the precise hour and minute when it was made, and the particular key that was employed, with all the variations accomplished by the devices described in the specification of the prior patent.

Attempt is made in argument to support the first assignment of error chiefly by reference to three exhibits introduced in evidence by the respondents, which were known and used by the public prior to the date of the patent described in the bill of complaint. They are the patent of Schwilgue, the patent of Rowbotham, and the patent of Nolet.

Before entering upon a separate examination of these several patents, it is proper to remark that it is not pretended that any one of them embodies the entire invention secured to the complainant in his letters-patent. Nothing of the kind is pretended, but it is insisted that each contains some feature, device, or partial mode of operation corresponding in that particular to the corresponding feature, device, or partial mode of operation exhibited in the complainant's patent.

Suppose that is so, still it is clear that such a concession cannot benefit the respondent, it being conceded that neither of the exhibits given in evidence embodies the complainant's invention or the substance of the apparatus described and claimed in his specification. Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement. *Bates* v. *Coe*, 98 U. S. 31, 48.

Authority is given to a defendant in an action at law or to a respondent in an equity suit to plead or set up in the answer that the patentee is not the original or first inventor of the improvement; but if the plaintiff or complainant introduces his patent in evidence, the burden is cast upon the defending party to prove his defence, which he may do by showing that the

thing patented had been invented or discovered by some other person in this country prior to the alleged invention in the pending suit, or that it had been patented or described in some printed publication in this or any foreign country. Rev. Stat., sect. 4920.

Apply that rule to the facts of the case, and it is clear to a demonstration that neither of the exhibits given in evidence by the respondents constitutes any defence to the charge contained in the bill of complaint. Curtis, Patents (4th ed.), sect. 98.

Similarities may doubtless be shown between certain features of the apparatus invented by Schwilgue and the apparatus patented to the complainant, as contended by the respondents; but they utterly fail to point out the differences, except in one or two particulars. They differ not only in construction, but in the mode of operation, and in almost every particular which gives value to the device as a time detector for watchmen, the foreign patent being much more cumbrous and inconvenient than that of the complainant. Stationary detectors were employed at an early period to secure fidelity in watchmen in making the rounds of their beat in factories or other business establishments. Detectors of the kind were soon followed by portable watch-movements which were carried by the watchman, on which he stamped with ink or other coloring matter the proof of his visit to the several rooms within his beat. Enough appears to show that the patent of Rowbotham was nothing more than an improved apparatus of that class, being evidently so unlike that of the complainant as not to deserve much examination.

Nor is it necessary to enter much into detail in disposing of the other exhibit introduced by the respondents, as it evidently belongs to the same class of detectors as the preceding, and bears little or no relation to the apparatus of the complainant.

Argument to show that the present apparatus of the complainant is substantially different from that described in the expired patent cannot be required, as the comparison already given is amply sufficient to prove that difference to every one not blinded by self-interest or prejudice. Tested by these considerations, it is plain that nothing remains for re-examination but the question of infringement.

Persons seeking redress for the unlawful use of their inventions must allege and prove that they or those under whom they claim are the original and first inventors of the improvement, and that the patent for the same has been infringed by the party against whom the suit is brought. Where the patent in suit is introduced in evidence it affords a *prima facie* presumption that the invention is new and useful; but the burden to prove infringement never shifts if the charge is denied in the plea or answer. Sufficient proof of infringement may be derived from the comparison of that which is used by the defending party with the description of the invention given in the specification of the patent which constitutes the foundation of the suit, and where the invention is embodied in a machine or apparatus, that mode of conducting the examination is usually the most satisfactory. Sufficient explanations of the complainant's patent have already been given, which need not be repeated.

None, it is presumed, will deny that the time detector sold by the respondents is in appearance and general construction similar to that described in the specification of the complainant. Beyond all doubt, the respondents employ a watch-movement with a series of keys and a single hole, together with a revolving dial fastened to the watch arbor. Like the complainant they dispense with the hour and minute hands of the watch, and attach the false or paper revolving dial to the arbor of the apparatus. Their stationary index is exactly the same as that of the complainant, and they also employ a series of markers arranged radially to the centre of the dial; but the markers are unyielding, while the index is so constructed as to enable the markers to perform the same function as those employed in the complainant's apparatus. They arrange their markers under the false dial, and place the yielding index over the back of the false dial, so that the marks are made from the inside instead of from the outside.

Expert testimony was taken by the complainant, and his witness testified that the apparatus of the respondents is substantially the same in construction and mode of operation as that described in the complainant's specification, and gave his reasons for the conclusion in substance and effect as follows:

That the arrangement of the markers is in a line radiating from the centre, the markers being made stationary, so that instead of pressing against the keys while the index supports the paper, the keys, supported by the stationary index, press the paper against the markers; the faces of the markers, instead of being simple points, form what is called small figures, and the divisions of the paper dial, by concentric circles, is omitted, it appearing that the different figures are made to indicate the different stations, but the arrangement of the gang of markers is preserved. It is denied by the respondents that the index in their apparatus yields; but the witness testifies that, by taking a sight over the edge of the case parallel to the dial when the watch is open, the stationary index is seen to yield, and acts as a spring. Taken as a whole, he regards the marking device as substantially similar to that employed by the complainant.

Unless there is some yielding, either of the markers or the index, it is not easy to see how the key could be turned without tearing the paper or breaking the key, from which it must follow, as contended by the complainant, that the respondents have substituted for his series of yielding spring-points and index a series of permanent or unyielding markers and a yielding index, retaining the other necessary elements of a false dial which shall receive the impressions by the use of the described keys.

Differences between the two arrangements undoubtedly exist, as is usually the case where one is borrowed from the other without consent. Most or all of those differences are well described by the circuit judge in the case to which reference has already been made. Speaking of the infringing apparatus, he says that the gang of steel springs, instead of being placed beneath the circular plate or frame of the watch-movement, is attached to the lid of the case of the instrument, immediately over the location of the gang of springs in the complainant's detector. When closed, the line or row of points is in the same straight line radially from the centre, and in order to perforate the paper dial they must be pressed downward instead of upward. To that end the key-hole is placed in the side of the lid over the gang of springs instead of being placed in the body of the case below the springs. Instead of the fixed index placed

over the holes through which the points rise to perforate the paper, the respondents have in the same location a row of holes in the plate or frame of the movement, into which the points enter, to protect them from injury when making the perforations. During the act of perforation the paper in the complainant's apparatus is sustained by the fixed index, but the necessity for that in the infringing apparatus is obviated by making the motion of the springs downward, whereby the plate of the watch performs the same function during such act.

Other minor differences exist in the manner the paper disk is attached to the revolving disk which is fastened to the arbor of the watch-movement, but they are not deemed to be of the substance of the infringed invention. Examples are also produced as exhibits where are shown watch-dial hands on the detector of the respondents which do not appear on the apparatus of the complainant; but that is a matter not supposed to be included in the infringed patent.

Suffice it to say, without entering further into the comparison of the two specifications, that we are all of the opinion that the charge of infringement is fully sustained, both by the comparison of the specifications, one with the other, and by the proofs exhibited in the transcript.

Exceptions were taken to the master's report; but the rulings of the court in respect to the amount adjudged to the complainant for the infringement not having been assigned for error, are not the proper subject of re-examination. *Buerk* v. *Imhaeuser*, 14 Blatchf. 19.

Decree affirmed.

SCIPIO v. WRIGHT.

1. An act authorizing a town to borrow money for aiding in the construction of a railroad provides that "all moneys borrowed under the authority of this act shall be paid over to the president and directors of such railroad company (now organized, or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850) as may be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing, and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga or the New York and Erie Railroad." *Held*, that the tax-payers were not thereby required to "express" (that is, designate) the company by name; and that an assent authorizing the money to be paid "to the president and directors of a railroad company organized according to the requirements of the general railroad laws for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga Railroad and passing through the city of Auburn," was sufficient.
2. A prerequisite to the issue of bonds by town authorities, that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office of the county, is intended as a protection against a town debt rather than against the form it might assume after it had been incurred, or when the security for it should be given. And where such prerequisite was coupled with authority to subscribe to the capital stock of a railroad company a sum equal to the amount of the bonds issued, — *Held*, that they are not invalid because not issued until after the date when the assessment-roll referred to was by law required to be completed, the assent having been filed, and the subscription for the stock of the company made, the bonds executed and some of them sold and the proceeds paid on account of the subscription before that date.
3. A statute of New York authorizing towns to subscribe to the capital stock of railroad companies and issue bonds for the purpose of borrowing money therefor, prescribed the manner in which the power conferred should be exercised. It appearing to be the settled construction given by the courts of that State to this statute, under which certain bonds now in suit were issued, and to other similar statutes, that they do not authorize an exchange of bonds for shares of stock, and that a purchaser, with notice that such a disposition of the bonds was made by the town officers, cannot recover in a suit brought upon them, this court follows this construction of the State statute.

ERROR to the Circuit Court of the United States for the Northern District of New York.

This was an action brought by William P. Wright against

the town of Scipio, on twenty-five instruments in writing, numbered from 1 to 25, both inclusive, all being alike, except as to their number, and also except that eight of them, being those numbered from 1 to 8, both inclusive, are payable to Slocum Howland or bearer. The others are payable to bearer, no payee being named therein. To all were annexed coupons for the sum of thirty-five dollars each, differing only as to the time when payable, there being one coupon for each instalment of semi-annual interest on each bond, the first being due July 1, 1858, and the last, Jan. 1, 1873. One of which instruments is in the words and figures following, viz.: —

"No. 2.] STATE OF NEW YORK, COUNTY OF CAYUGA. [$1,000.

"Seven per cent loan, not exceeding $25,000.

One thousand dollars.

"Be it known that the town of Scipio, in the county of Cayuga and State of New York, in pursuance of an act of the legislature of said State, entitled 'An Act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna Railroad,' passed April 16, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn, and New York Railroad, owes and promises to pay to Slocum Howland or bearer one thousand dollars, with interest at the rate of seven per cent, payable semi-annually on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal to be reimbursable at the same place at the expiration of twenty years from the first day of January, 1853.

"In testimony whereof, the supervisor and commissioners of the town of Scipio have, pursuant to the provisions of the act aforesaid, and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names this twentieth day of May, A.D. 1853.

"WILLIAM TABER,
"*Supervisor.*
"CALVIN TRACY,
"GEORGE SLOCUM,
"*Commissioners.*"

One of the coupons next to said instrument No. 2 is in the words and figures following: —

"$35.]

"The town of Scipio, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of July, 1858, being interest due on that day on bond No. 2.

"WILLIAM TRACY,
"*Supervisor.*
"CALVIN TRACY,
"GEORGE SLOCUM,
"*Commissioners.*"

Wright recovered judgment, and the town removed the case here.

The remaining facts and the statutes bearing upon the case are stated in the opinion of the court.

Mr. George F. Comstock and *Mr. S. Edwin Day* for the plaintiff in error.

Mr. David Wright, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

At the trial of this case in the Circuit Court the extraordinary number of thirty-three exceptions were taken by the plaintiff in error, and signed by the judge. It does not, however, always happen that the merits of a case brought in error are to be measured by the number of exceptions taken in the inferior court, or by the number of errors assigned. In this case, the real questions — the only ones that need particular attention — are few.

The plaintiff below brought suit upon twenty-five bonds, or rather notes, each for the sum of $1,000, which, as he alleged, had been issued by the township in pursuance of and under authority of law. Of course, it was incumbent upon him to prove that the town was authorized to create the instruments, and to dispose of them in the manner in which disposition of them was made. The authority relied upon was an act of the legislature passed on the 16th of April, 1852, entitled "An

Act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Susquehanna and Cayuga Railroad." The first section enacted as follows: —

"It shall be lawful for the supervisor of any town in the county of Cayuga" (the town of Scipio being one), "and the assessors of such town, who are appointed by this act as commissioners to act in conjunction with the said supervisor in effecting and executing the purposes of this act, to borrow, on the faith and credit of said town, such a sum of money as they may deem necessary, not to exceed $25,000, for a term of time not to exceed twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually during the term said money may be borrowed. . . . All moneys borrowed under the authority of this act shall be paid over to the president and directors of such railroad company (now organized, or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850), as may be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing, and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad: *Provided always*, that the said supervisor and commissioners shall have no power to do any of the acts authorized by this act, until a railroad company has been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto."

The second section we also quote, as follows, so far as is needful:—

"SECT. 2. It shall be lawful for the supervisor and commissioners of any town in said county, on obtaining and filing such assent, as provided in the first section, to subscribe for and take in the name of and for said town, such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads, as will be equal to the amount of the bonds executed under the authority of this act."

The tenth section made it the duty of the electors of the town to elect at the next annual town meeting two commissioners to act in conjunction with the town supervisor in carrying into effect the provisions of the act.

At the time when this act was passed, so far as it appears, there was no organized company in existence with power to build such a railroad as the act described; but on the 23d of August next following, articles of association of such a company, organized under the general railroad laws of the State for the purpose of constructing a railroad from Lake Ontario to the Cayuga and Susquehanna Railroad, passing through Auburn and Scipio, were filed in the office of the Secretary of State. Subsequently to the formation of this company, the supervisors and assessors of the town obtained a written assent of three hundred and one residents and taxables of the town, appearing on the assessment-roll for the year 1852, and on the 8th of December, 1852, two of the assessors made oath that the persons whose written assents were attached thereto comprised two-thirds of all resident tax-payers of the town of Scipio, on the assessment-roll thereof for the year 1852. These assents and the affidavit indorsed thereon were filed in the clerk's office of Cayuga County on Jan. 11, 1853. On the 1st of March, 1853, two railroad commissioners were duly elected for the town, and on the 16th of May next following, they, together with the supervisor, in the name and for the town, subscribed upon the books of the said railroad company for five hundred shares of fifty dollars each of its capital stock. On the 20th of the same month they executed by their official signatures the twenty-five notes in suit, payable to

bearer. Eight of them were sold by the commissioners to Slocum Howland at par; and the proceeds of the sale were paid to the railroad company on account of the stock subscription, the commissioners taking from the company for the town a certificate for the five hundred shares of stocks, which, so far as it appears, the town now holds. To this extent money was borrowed upon the bonds, and paid over in accordance with the statute. Howland also bought the remaining seventeen bonds from the railroad company, to which they had been delivered by the railroad commissioners under an arrangement we shall notice hereafter, and the company indorsed the certificate of stock as full paid. It is out of these facts that the principal questions involved in the case arise.

It is contended by the plaintiff in error that the bonds were unauthorized; because, as it is alleged, the written assent of the tax-payers did not conform in substance or meaning to the requirement of the statute, in that it did not "express the railroad corporation to which the moneys to be borrowed by the town should be paid." We think this position is quite untenable. The identification of the company in the written assent is as perfect as it would have been had it been described by its corporate name. The statute did not require that the tax-payers should "express" (that is, designate) the company by its name. Any mode of description that designated it was sufficient. The assent authorized the commissioners to pay the money borrowed, for which the bonds were to be given, "to the president and directors of a railroad company organized according to the requirements of the general railroad laws for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga Railroad, and passing through the city of Auburn." This was in strict conformity with the description given in the statute. It fitted exactly the company organized in August, 1852, and there cannot be a doubt that the assent was intended to designate that company. There was no other company in existence to which the description could apply. Unless, therefore, the word "express," as used in the statute, was intended to convey some other meaning than "*described*" or "*designated*" (which can be maintained

with no show of reason), the assent in form was all that was required for authority to issue the bonds.

A second position taken by the plaintiff in error is that all the bonds except three are void, because they were issued after the assents of the tax-payers as appearing on the assessment-roll of the town for the year 1852 had spent their force and ceased to be authority. This is founded upon the phraseology of the statute, which requires as a prerequisite to any action by the commissioners that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office. Recalling the facts, heretofore stated, the written assent of the required number of tax-payers on the assessment-roll of 1852 was obtained and verified, and it was filed on the 11th of January, 1853. Then the authority to issue the bonds, borrow the money, subscribe for the stock, and elect railroad commissioners became perfect. The town did elect railroad commissioners on the 1st of March, 1853, the subscription for the stock of the company was made, a debt of $25,000 therefor was incurred, and the bonds or notes for an equal amount were executed, and at least some of them were sold at par and the proceeds of the sale were paid on account of the subscription, all before any new assessment-roll could be completed and before the law required any to be made. For all this there was complete authority. Every thing had been done which was required to authorize the creation of the indebtedness to the railroad company. Did the legislature intend that after the town had lawfully created a debt and lawfully executed bonds with which to borrow the money necessary to pay it (bonds confessedly authorized at the time when they were made), the bonds should become void if the money could not be borrowed within two months and a half, or between May 20 and Aug. 1, 1853? Did it intend thus to leave the debt in existence, and at the same time to take away the power to provide means for its payment? Such a construction of the act would be most unreasonable. It would be standing upon the letter and ignoring the spirit of the statute. It would be closing our eyes to the only substan-

tial reason for requiring the assent of two-thirds of the resident tax-payers before the commissioners could exert the power given to them by the legislature. That was to ascertain whether the tax-payers would consent to the creation of a town liability, not to ascertain how or when the debt, when incurred, should be evidenced. The substance of the power was the creation of a town debt. All the rest was formal. The legislature, it may be admitted, did not intend that the power conferred upon the railroad commissioners should continue indefinitely. Hence the assent of two-thirds of the taxable residents as appearing on the assessment-roll made next previous to the borrowing of the money was required. But evidently by this was meant that the assent should be given by the tax-payers appearing on the roll made next before any debt of the township should be incurred. It was protection against a town debt that was intended, rather than protection against the form of the debt or the shape it might assume after it had been incurred or when the security for it should be given. Two distinct powers were given by the statute, each dependent for its exercise, though not for its creation, upon the prior consent of the taxables. The one was described by the first section. It was to borrow money and execute bonds therefor, paying over the money borrowed to a railroad company to be expended in grading, constructing, and maintaining its road. This section made no reference to a subscription for the stock or to a debt directly to the railroad company.

But the second section authorized a subscription to the capital stock and the consequent assumption of a legal liability to the company, equal to the amount of the bonds issued, which might be discharged afterwards by levying a tax, or by borrowing money, giving bonds therefor, and paying it over. Nothing in the act postponed a subscription for stock until the money to pay for it could be borrowed. This debt was incurred before the assessment-roll of 1853 had any existence. The right to incur it when it was incurred was, therefore, complete. The exercise of the power was warranted by the written assent filed. For these reasons we think the instruments sued upon are not invalid, because they were not issued until after Aug. 1, 1853, when the assessment-roll for that year was by law required to be completed.

The only other question raised by the assignments of error, and by the numerous exceptions, is, whether the circuit erred in refusing to rule, as requested by the defendant, that the plaintiff could not recover for the last seventeen bonds, because, instead of having been issued for money borrowed, they were issued directly to the railroad company in exchange for its stock.

This objection has no application to the first eight bonds, numbered from 1 to 8 inclusive. They were sold at par, and the proceeds were paid over to the company. This was, as we have said, a substantial borrowing. The facts respecting the remaining seventeen, as they appear in the record, may be thus summarized: —

On the 7th of January, 1854, the railroad company received from the "railroad commissioners" of the town the seventeen bonds, nominally at par, and indorsed "full paid" on the certificate of stock, which the town had previously taken, and upon which $8,000, the proceeds of the first eight bonds, had been paid. This arrangement was accompanied by a written understanding that the company might at any time within eight months from Oct. 11, 1853, redeliver the bonds, or any part of them, to the town, and reduce the amount of credit on the certificate accordingly; and that if the company should sell the bonds for more than par, it should account to the town for the excess, but that the town might at any time within the said eight months, and prior to the sale of the bonds by the company, have the right to demand the redelivery thereof on payment to the company of the par value. The bonds were never redelivered, nor were they demanded. Some time after Jan. 7, 1854 (when does not exactly appear), Slocum Howland bought the seventeen bonds from the railroad company, with notice that money had not been borrowed upon them, but that they had been transferred by the town supervisor and railroad commissioners, or one or more of them, in the first instance to the company in exchange for its stock. What Howland paid for them, whether the company obtained their full par value, is not proved.

Howland held the bonds until 1874, after they became due, when he sold them to the plaintiff, taking his note for the whole

price, and that note remains unpaid. Neither Howland, therefore, nor Wright; the purchaser from him, stands in the position of a *bona fide* purchaser without notice of the exchange of the bonds for stock. Had either of them been such a purchaser, the plaintiff's right to recover could not be gainsaid. But the question now is, whether the fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company, is a defence for the town against a holder who, when he purchased, had notice of the manner of their issue. Were the question an open one, it would seem that it ought not to be a defence. It might be regarded as a fair presumption that the bonds were sold to Howland for not less than their par value, and that the company received their full amount in money; or the transaction might be regarded as practically a borrowing of the money by the town through the agency of the railroad company. So far as discharging the debt of the town for its stock subscription is concerned, and so far as relates to obtaining a full-paid certificate, the transaction is, in legal effect, the same as if the money had been borrowed by the town directly and paid over to the company. And, if it had appeared affirmatively that Howland had paid the full face of the bonds and interest, without any discount, when he bought, every object which the statute could have had in view in enacting that it should be lawful for the town officers to borrow on the credit of the town a limited amount of money and pay it over to the railroad company, executing town bonds therefor, would have been accomplished. In *Gould* v. *The Town of Sterling* (23 N. Y. 456), it was said by Selden, J., when speaking of a transaction like that we have now under consideration, where there had been an exchange of town bonds for railroad stock: "If what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material." Such a case, however, is not presented by this record.

The statute prescribed the manner in which the power it conferred should be exercised. The town was at liberty to subscribe for stock, but if bonds were used to pay for it the mode of use was directed to be borrowing money with them and paying the money to the railroad company. It is quite

conceivable that the purpose of such a direction, instead of allowing an exchange of the bonds for the stock taken, was that the railroad company might obtain an amount of money equal to the amount of the bonds. This was important to the company, to the town as a stockholder, and to the public as interested in the projected railway. If the bonds might be delivered directly to the company in payment of the stock, it might sell them at a discount. Thus it would fail to obtain the assistance in building its road which the legislature contemplated it should have. Its stock would be practically sold for less than par, and it would not be worth as much to the town as it would be had all the money for which the bonds were given come into the company's treasury. Whether such were the motives that induced the peculiar phraseology of the statute or not, the highest court of New York has repeatedly construed it as prescribing the manner in which the bonds might be used or issued, and as denying the power to exchange them directly with the railroad company for the stock taken by the town. These decisions have been constructions of the identical statute we have now under consideration, and by which the bonds now in suit are alleged to have been issued. The construction given by the State court must, therefore, be our guide. *Starin* v. *The Town of Genoa* (23 N. Y. 439) was a suit for interest upon town bonds made under the act. They had been exchanged with a railroad company for capital stock taken for the town, and the exchange was accompanied by the same agreement as that made between the town and company in the present case. The plaintiff was a purchaser from the railroad company, with knowledge that it had received the bonds in payment of stock. In these respects the case was exactly like the present. The Court of Appeals ruled that issuing the bonds by exchanging them for the company's stock was not an execution of the power and authority granted by the statute, but an appropriation of them in a manner not contemplated by the legislature, or by the taxpayers' assent. The court said, "It was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or position that the credit merely of any town should be given, through and by which money might be raised." They, there-

fore, held that the bonds were issued without authority, and as the railroad company received them on a consideration not authorized, it was chargeable with a knowledge of their invalidity, and it never could have enforced them. It was further ruled that the plaintiff stood in no better position, that having purchased with notice of the manner in which they had been issued, he was not a *bona fide* holder. *Gould* v. *The Town of Sterling* (23 N. Y. 456) is a similar case, and the ruling of the court was the same. In *The People* v. *Mead* (24 id. 114) we find a reassertion of the invalidity of bonds first negotiated by exchanging them for stock of the railroad company. The opinion was delivered by Denio, J. It was, however, said that a *bona fide* holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the town, would not be liable to the defence which existed against the railroad company. *Horton* v. *The Town of Thompson* (71 id. 513) is another case in which the Court of Appeals gave the same construction to another similar statute, holding that bonds exchanged for stock were unlawfully issued, and that a purchaser, with knowledge that they had been thus issued, could not enforce them.

It thus appears to be the settled construction given by the courts of New York to the act under which the bonds now in suit were issued, and to other similar acts, that they do not authorize an exchange of bonds for shares of the capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such a disposition of the bonds was made by the town officers or railroad commissioners, cannot recover in a suit brought upon them.

We find no decision of the Court of Appeals that is in conflict with what was ruled in the cases we have cited, or which weakens their authority, and as they are constructions of a State statute, we are constrained to follow them. *Gould* v. *The Town of Oneonta* (71 N. Y. 298), to which we have been referred, presented an entirely different question. A statute enacted in 1859 had authorized the transfer of the bonds directly to the railroad company in payment of the stock.

Our conclusion, then, is that the Circuit Court erred in declining to instruct the jury, as requested, substantially, that upon

the facts proven in the case (and not contradicted), the plaintiff was not entitled to recover upon any of the seventeen bonds, because the supervisor and commissioners did not issue them for borrowed money, but transferred them to the railroad company in payment of the stock subscription.

We find no other error in the record.

The judgment will be reversed and the cause remanded for a new trial; and it is

So ordered.

MR. JUSTICE CLIFFORD and MR. JUSTICE SWAYNE dissented.

DOUGLASS *v.* COUNTY OF PIKE.

1. The court reviews the legislation and judicial decisions of Missouri, whereby the constitutionality of an act of the General Assembly, entitled "An Act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868, was recognized and affirmed long after the county authorities had issued, pursuant to its provisions, the bonds whereon this suit was brought. The court in this case adheres to its ruling in accordance with those decisions, as announced in *County of Cass* v. *Johnston* (95 U. S. 360), although the Supreme Court of Missouri has since declared that act to be in conflict with sect. 14, art. 11, of the Constitution, adopted by that State in 1865.
2. Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the State as they were then construed by her highest court; and in a case involving those rights this court will not be governed by any subsequent decision in conflict with that under which they accrued.
3. The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment by legislative enactment.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action by Joseph M. Douglass on three hundred and twenty-one overdue coupons detached from bonds issued by the county of Pike, Missouri. The bonds are in the following form: —

"No. ——.] STATE OF MISSOURI. [$500.00.

PIKE COUNTY BOND.

"*Issued in payment of Stock of the Pike County Short Line Railroad Company.*

"Know all men by these presents, that the county of Pike, in the State of Missouri, acknowledges itself indebted and firmly bound to the Pike County Short Line Railroad Company in the sum of five hundred dollars, which sum the said county promises to pay to the said Pike County Short Line Railroad Company, or bearer, at the National Bank of the State of Missouri, in St. Louis, Mo., on the first day of January, A.D. 1892, with interest thereon from the first day of January, A.D. 1872, at the rate of ten per cent per annum; which interest shall be payable semi-annually on the presentation and delivery at said National Bank, of the coupons of interest hereto attached; this bond being issued under and pursuant to an order of the county court of Pike County, by authority of an act of the General Assembly of the State of Missouri, approved March 23, 1868, entitled 'An Act to facilitate the construction of railroads in the State of Missouri,' and authorized by vote of the people of Cuivre Township, in said county, taken as required by law, Feb. 7, 1871.

"In testimony whereof, the said county of Pike has executed this bond, by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court; this done at Bowling Green, county of Pike aforesaid, this first day of January, A.D. 1872.

"[SEAL.] A. G. GRIFFITH,

"*Presiding Justice of County Court of Pike County, Missouri.*

"Attest: H. C. CAMPBELL,

"*Clerk of County Court of Pike County, Missouri.*

The declaration avers that the county, in behalf of said township, subscribed for and received and retains the stock of said railroad company to an amount equal to the bonds, and paid the coupons falling due up to Jan. 1, 1876; that the road was built through the township; that the subscription was authorized by a vote duly taken, as required by law, on the seventh day of February, 1871; that he is the holder for value of the coupons sued on, and that he duly presented them for

payment at said bank as they became due, and that payment was refused.

Judgment was rendered in favor of the defendant on its demurrer to the plaintiff's declaration, the question involved being the constitutionality of the act whereof mention is made in the bonds.

The plaintiff thereupon sued out this writ of error.

Mr. John H. Overall and *Mr. Frederick N. Judson* for the plaintiff in error.

Mr. George F. Edmunds and *Mr. Thomas J. C. Fagg* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We are asked to reconsider our decision in *County of Cass* v. *Johnston* (95 U. S. 360), because since that case the Supreme Court of Missouri, in *State, ex rel. Woodson*, v. *Brassfield* (67 Mo. 331), and *Webb* v. *La Fayette County* (id. 353), has held the Township Aid Act, which we sustained, to be unconstitutional. The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced. In the Cass County case we said that the Supreme Court of the State had often been called on to construe and give effect to the act, and had never before that time in a single instance expressed even a doubt as to its validity. We have again examined all the cases, and find that what we then said was true. Judge Dillon, who filled the office of circuit judge in the eighth circuit with such distinguished ability during nearly all the time the act was in operation, from its original passage until after the recent decisions, remarked in *Westerman* v. *Cape Girardeau County*, 7 Cent. Law Jour. 354: "A hundred cases — and I do not think I exaggerate — have been brought on these township bonds in the Federal courts of this State, and prior to the decision in *Harshman* v. *Bates Co.* (92 U. S. 569), none of the able lawyers defending these cases ever made a point that the act of March 23, 1868, was unconstitutional." The reason is obvious. At the very outset it

was thought best to take the opinion of the Supreme Court of the State on that subject. The act went into operation in 1868, and in 1869 *The State* v. *Linn County* (44 Mo. 504) was decided. There a township had voted to subscribe to the stock of a railroad company, and the county court had made the subscription; but after this was done the court refused "to deliver the bonds, for the alleged reason, only, that the act under which the subscription was made was unconstitutional and void." An application was then made for a *mandamus* to compel the delivery of the bonds; and the only questions presented by the counsel for the respondent in the argument of the case, as shown by the report, were those of constitutionality, and especially was it urged that the act was repugnant to art. 11, sect. 14, which, quoting from the opinion, "declares the General Assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." All the objections presented were considered by the court, and in conclusion it was said, "The county court having made the subscription, the company is entitled to the bonds." It is quite true that the precise objection which has since been raised was not then urged or considered; but the alleged discrepancy between the act and the Constitution was just as apparent then as it is now, and Judge Dillon, in *Foote* v. *Johnson County* (6 Cent. Law Jour. 346), says: "Suits in great numbers on these township bonds have been brought in the Circuit Court of the United States for this district, and they have been defended by the ablest lawyers in the State, upon every ground that they conceived open to them; but this difference between the phraseology of the Constitution and the act, so patent that it could not escape attention, was never presented or urged in any case, so far as either of us recollect, as invalidating the act." In *County of Cass* v. *Johnston*, we attributed this to the fact that in other cases it had been substantially decided that the language of the act and that of the Constitution were in legal effect the same, and we at that time took occasion to look somewhat critically into the rulings on that subject. We have again examined that

question, and are satisfied with the correctness of our former conclusion. It is thought, however, that we did not give sufficient effect to *State* v. *Sutterfield*, 54 Mo. 391. As to that, we said the question presented related to another clause of the Constitution, and that the decision was placed expressly on the ground of a difference between the two provisions. In this it is urged we were in error. The clause of the Constitution there under consideration was art. 4, sect. 30, which is: "The General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." Under this provision of the Constitution a statute was passed providing for elections in such cases, to the effect, "if it shall appear by such election that two-thirds of the legally registered voters of said county are in favor of the removal of the county seat of such county, then," &c. In the opinion the court say: "There is no doubt that in general, when an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by law, whether it be a bare majority, or two-thirds or three-fourths, is determined by the result of the vote cast, without regard to the number declining to vote; and this is upon the ground that a failure to vote is assumed, or may be presumed, to be an acquiescence in whatever result may be produced by the action of those who feel a sufficient interest in the election to go to the polls and vote, and for the further reason that in most cases there is no mode by which the number of absentees can be ascertained. . . . Our Constitution in regard to the proposed removal of county seats, it seems to me, hardly admits of two constructions. It prohibits the legislature from removing them unless two-thirds of the qualified voters shall, at a general election, vote for the removal. The words do not imply an acquiescence or negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of votes required is specifically named, and there is no difficulty in ascertaining what that number is, since the same Constitution provides for a registration, and points out who qualified voters are; and the statute in this case uses the words 'legally registered voters,' and requires two-thirds of them to

vote for the change." The court then refers to *Bassett* v. *The Mayor of St. Joseph* (37 Mo. 270), *State* v. *Binder* (38 id. 450), and *State* v. *Winkelmeier* (35 id. 103), and says: "In none of these cases, however, was there any examination of, or construction given to, the precise language of the constitutional provision now under consideration. . . . The present case, however, presents very different considerations. The question of removing county seats was regarded by the framers of the Constitution as of sufficient importance to require very stringent provisions in that instrument, and an examination of the laws in force on this subject, at the time of the adoption of the new Constitution, will show the great importance of requiring a strict compliance with its provisions." We think, then, we were not in error in supposing that the court believed there was an essential difference between the two provisions of the Constitution, and especially so as the judge who delivered the opinion of the court in *State* v. *Sutterfield*, by his dissent in the later cases of *State* v. *Brassfield* and *Webb* v. *La Fayette County*, clearly indicates his disapproval of the effect upon the question now under consideration which was then given that case.

The legislative recognition of the difference between these two clauses of the Constitution is equally apparent. The Constitution went into effect in July, 1865, and it became the duty of the legislature, at its next session, which commenced in November, to adapt the old laws to the new order of things. In this connection, it must be borne in mind that the provision for a registration of voters was first introduced into the policy of the State by this new Constitution.

The then existing law regulating the removal of county seats provided that "whenever three-fifths of the taxable inhabitants of any county, as ascertained by the tax-list made and returned last preceding the application, shall petition the county court praying a removal of the seat of justice thereof to a designated place, the court shall appoint five commissioners," &c. Rev. Stat. Mo. 1855, p. 514, sect. 1. To meet the requirements of the new Constitution on this subject, an election was provided for, and it was enacted that if it should appear by such election that two-thirds of "the legally registered voters" were in favor

of the removal, commissioners should be appointed to perform the same duties prescribed in the old law. Gen. Stat. Mo. 1865, p. 223, sects. 20–22. Here it is evident the legislature had in mind both the provision for registration of voters and the somewhat unusual requirement that two-thirds of the qualified voters of the county should *vote* for the measure.

The old law respecting the subscription by the county courts to the capital stock of railroad corporations was as follows: "It shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters who shall vote at such election under the provisions of this act." Acts of 1860–61, p. 60, sect. 2. In adapting this to the new constitutional requirements, this is the language used: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock, &c., provided that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. Stat. Mo. 1865, p. 338, sect. 17. This, it will be seen, is the exact language of the Constitution itself, and the intention evidently was to leave its meaning to be ascertained by judicial construction. By another statute passed at the same session of the legislature, the charter of the city of St. Joseph, which had before authorized subscriptions to the capital stock of railroad companies if a majority of the real estate owners in the city sanctioned the same, was amended so as to require that question to be submitted "to a vote of the qualified voters of said city, and in all such cases it shall require two-thirds of such qualified voters to sanction the same." Acts of 1865–66, p. 269, sect. 1. At the same session, in amending the charter of the town of Clarksville, evidently to accomplish the same object, this is the language employed: "After first having obtained the consent of the inhabitants, as required by the Constitution of the State." Id. p. 254, sect. 1.

At the February Term, 1866, of the Supreme Court of the State, that court was called on, in *Bassett* v. *The Mayor of St. Joseph* (37 Mo. 270), to give a construction to the act amend-

ing the charter of St. Joseph. Under that act an election was held on the 13th of January, 1866, to vote upon the question of an issue of bonds, and four hundred and four votes were polled, of which three hundred and thirty-six were in favor of and fifty-eight against the measure. The mayor refused to sign the bonds after the vote had been taken, and a *mandamus* was asked to require him to do so. The only reason he gave for declining to sign the bonds was, that "he was in doubt whether the matter was to be determined by two-thirds of the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not." In the argument in support of the application for the writ, the attention of the court was called to the fact that there was "no registry law by which the qualified voters in the city could be ascertained," and it was further said, "the votes cast at the last election for city officers and the votes cast at said subsequent election furnish the only correct criterion to ascertain the number of qualified voters in the city at the time said special election was held." In the opinion, mention is also made of the number of votes polled at the next preceding election; but the court, after stating the exact question put by the mayor as indicating his own doubts, uses this direct and unmistakable language: "We think it was sufficient that two-thirds of the qualified voters who voted at the special election authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters on that question. There would appear to be no other practicable way in which this matter could be determined." It is true, the bonds voted at this election were not to be used in payment of subscriptions to the stock of railroad companies, but the law construed was the one in which provision was made for such subscriptions. Following this, at the October Term, 1866, of the same court, was the case of *State* v. *Binder* (38 Mo. 450), in which similar language in another statute was construed, and *Bassett* v. *The Mayor of St. Joseph* cited as establishing the doctrine "that an election of this kind authorized for the very purpose of determining that question, on public notice duly given, was the mode contemplated by the

legislature as well as by the law for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practicable way in which such a matter could be determined. And," continues the court, "certainly, in the absence of any evidence to the contrary, it may be presumed that the voters voting at an election so held were all the legal voters of the city; or, that all those who did not see fit to vote (if there were any) acquiesced in the action of those who did vote, and so are to be considered as equally bound and concluded by the result of the election. *Rex* v. *Foxcroft*, 2 Burr. 1017; Wilcox on Corp. 546." Certainly, after these two decisions, made under the circumstances that attended them, and with the mind of the court directed by counsel in their argument to the registration laws, it might fairly be assumed by the legislature to have been judicially determined that the assent of two-thirds of the qualified voters voting at an election duly called and notified, was the legal equivalent of the assent of two-thirds of the qualified voters of an election precinct. Hence it was that at the session of the legislature which began in January, 1868, and as soon, probably, as the effect of these decisions had become generally understood, to avoid all future doubts as to what was meant, the equivalent language, as construed by the courts, was used, instead of that of the Constitution itself. And so we find not only in the Township Aid Act, but in other acts depending for their authority on the same clause of the Constitution, the requisite assent of those voting at an election was deemed by the legislature to be the assent of the qualified voters.

It was under this state of facts and the law that *The State* v. *Linn County* (*supra*) was heard and decided. Other objections to its constitutional validity than those which had formerly been considered were raised, argued, and decided in favor of the law. From that time forward, and until long after the issue of the bonds now in question, the law was treated by the courts and the people as valid and constitutional. No lawyer asked for a professional opinion on that subject could have hesitated to say that it had been settled. It would seem as though every question which could be raised had in some form, directly or indirectly, been presented and decided. While some of the

decisions were rendered before the passage of the township act, it is so clear that the peculiar language of that act was the consequence of those decisions that we do not deem it unreasonable to give them all the effect they would have if made afterwards.

We are, then, to consider whether, under these circumstances, we must follow the later decisions to the extent of destroying rights which have become vested under those given before. As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. The language of Mr. Chief Justice Taney, in *Rowan* v. *Runnels* (5 How. 134), expresses the true rule on this subject. He said, p. 139: "Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States which, in the judgment of this court, were lawfully made." Afterwards, in *Ohio Life Insurance and Trust Co.* v. *Debolt* (16 How. 416), the same learned Chief Justice, after reiterating what he had before said in *Rowan* v. *Runnels*, uses this language: "It is true the language of the court in that case is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction." This distinction has many times been recognized and acted upon. *Supervisors* v. *United States*, 18 Wall. 71; *Fairfield* v. *County of Gallatin*, 100 U. S. 47. Indeed, if a contrary rule was adopted, and the comity due to State decisions pushed to the extent contended for, "it is evident," to use again the language of Mr. Chief Justice Taney, in *Rowan* v. *Runnels*, "that the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of

the United States, might become utterly useless and nugatory." The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a State court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts, in respect to their past adjudications, are well expressed in *Boyd* v. *Alabama* (94 U. S. 645), where we spoke through Mr. Justice Field. If the Township Aid Act had not been repealed by the new Constitution of 1875 (art. 9, sect. 6), which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. We always regret to find ourselves in conflict with the courts of the States in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction.

For these reasons, the judgment of the Circuit Court will be reversed, and the cause remanded with directions to overrule the demurrer to the petition, and take such further proceedings,

not inconsistent with this opinion, as law and justice may require; and it is

So ordered.

NOTE. — In *Darlington* v. *County of Jackson*, error to the Circuit Court of the United States for the Western District of Missouri, which was argued by *Mr. John B. Henderson* for the plaintiff in error, and by *Mr. John C. Gage* for the defendant in error, and in *Foote* v. *County of Pike*, error to the Circuit Court of the United States for the Eastern District of Missouri, which was argued by *Mr. John B. Henderson* and *Mr. Odon Guitar* for the plaintiff in error, and by *Mr. George F. Edmunds*, *Mr. Thomas J. C. Fagg*, and *Mr. Fillmore Beall* for the defendant in error, MR. CHIEF JUSTICE WAITE delivered the opinion of the court, reversing the judgments below on the authority of *Douglass* v. *County of Pike*, *supra*, p. 677.

CASE v. BEAUREGARD.

1. A. filed his bill claiming that he, as a creditor of a commercial firm, all the members of which were insolvent, had a prior lien or privilege upon the partnership property which had been transferred by them in payment of their individual debts, and seeking to subject that property to the payment of his debt. The bill, on a final hearing upon the pleadings and proofs, was dismissed. A. thereupon commenced a suit for the same cause of action against the same parties, alleging, in addition to the matters set forth in his former bill, that he had recovered a judgment at law against the partnership for the debt, and that an execution issued thereon had been returned *nulla bona*. *Held*, that the former decree is as *res judicata* a bar to the suit.
2. Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his remedy at law.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts out of which this case arises are stated in *Case* v. *Beauregard*, 99 U. S. 119. The bill in each case is in every essential particular the same, except that here the additional allegation is made that the complainant, as receiver, had brought an action at law and recovered judgment against Beauregard and May, as partners; that Graham, the other partner, was beyond the reach of process; and that an execution upon the judgment was returned *nulla bona*. The defendants pleaded

the decree in the former suit in bar, and the court, finding that the matter set up in the plea was sustained by the evidence, dismissed the bill. Case appealed.

Submitted on printed arguments by *Mr. Charles Case* for the appellant, and by *Mr. Henry C. Miller* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

That the complainant's bill exhibits the same cause of action which was set forth in his former bill against these defendants, and that he now seeks the same relief as that which was sought in his first suit, is quite apparent. The identity of the claims and equities asserted, as well as of the relief asked, is shown by an inspection of the records, and it is hardly denied. The object of both suits was to follow and subject to the payment of a debt due by the partnership of May, Graham, & Beauregard to the First National Bank of New Orleans, certain property alleged to have formerly belonged to the partnership, but which before the first bill was filed had been transferred to the railroad company. The claim made in each of the cases is that the bank has a privilege or lien upon the property for the partnership debt; that the railroad company acquired the property with knowledge of the existence of the lien, and that it is charged with a trust in favor of the bank. The decree dismissing the former bill must, therefore, be a bar to the present suit (it having been pleaded), unless the court which dismissed it was without jurisdiction of the case.

In the former bill it was not averred that judgment at law had ever been recovered against the partnership for the debt, and that an execution had been issued thereon and returned fruitless. The present bill contains such an averment. It is alleged that judgments at law were obtained against two of the members of the partnership on or about the twenty-sixth day of February, 1873, which was after the decree dismissing the former bill, and that executions issued upon those judgments had been returned that no property could be found. The complainant insists that this averment not having been made in the former bill, the decree of dismissal, though unqualified, cannot be regarded as a final adjudication of the equities between the parties, and that it is, therefore, no bar to the present suit.

It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one, that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he had done all that he could do at law to obtain his rights.

But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, "*Bona, sed impossibilia non cogit lex.*" It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner* v. *Adams*, 46 Mo. 95; *Postlewait & Creagan and Keeler* v. *Howes*, 3 Iowa, 365; *Ticonic Bank* v. *Harvey*, 16 id. 141; *Botsford* v. *Beers*, 11 Conn. 369; *Payne* v. *Sheldon*, 63 Barb. (N. Y.) 169. This is certainly true where the creditor has a lien or a trust in his favor.

So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. *Thurmond and Others* v. *Reese*, 3 Ga. 449; *Cornell* v. *Radway*, 22 Wis. 260; *Sanderson* v. *Stockdale*, 11 Md. 563.

In *Brisay* v. *Hogan* (53 Me. 554), it was ruled that when a

creditor seeks by his bill to obtain payment of his debt from land paid for by the debtor, but conveyed to his wife, a levy of an execution is unnecessary, if the debtor never had legal title to the land. See also *Day et al.* v. *Washburne*, 24 How. 352.

The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.

But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan* v. *Evans*, 11 N. H. 311; *Holt* v. *Bancroft*, 30 Ala. 193. Indeed, in those cases in which it has been held that obtaining a judgment, and issuing an execution, is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien, or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference.

Now, if we are correct in these views of equity jurisdiction, it is a plain inference that the decree pleaded in bar of the present suit was a final adjudication of the equities asserted by the complainant therein.

The bill in that case asserted in the most ample terms the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the railroad company, each of the members of the partnership was largely indebted, without means and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or either of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers

of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been necessary to show that the complainant had no remedy at law, — that his remedy, if he had any, was in equity?

But this was not all. The bill charged that the conveyances of the partnership property, and the transfers by which it had been vested in the railroad company, were illegal and fraudulent, that the bank had a privilege or lien upon the property, and it prayed that the various acts of sale, transfer, and conveyance by which the property that had belonged to the partnership had been conveyed to the railroad company, should be declared null and void, and that the property should be decreed to be liable to the payment of the amount due to the bank.

Thus it appears the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court, and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants. It would be idle, therefore, to reconsider the question whether the bank has a lien upon the property he seeks to charge, or whether there had been a trust in the bank's favor.

Decree affirmed.

ANTHONY v. COUNTY OF JASPER.

1. The act of the General Assembly of Missouri, entitled "An Act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, applies to bonds issued under the act approved March 23, 1868, commonly known as "The Township Aid Act."
2. The said act of March 30, 1872, declares that before a municipal bond thereafter issued shall obtain validity or be negotiated, it shall be presented to the State auditor, who shall register it and certify by indorsement that all the conditions of the laws and of the contract under which it was ordered to be issued have been complied with. *Held*, that unless the bonds are so indorsed, a holder of them cannot maintain an action thereon.
3. A township in Missouri voted to subscribe for stock in a railroad company. The proper county court, March 28, 1872, made the subscription, and, June 4, ordered that the bonds in payment therefor be issued. They were issued in October following, but bore date the day of the subscription. They were sealed with the seal of the court, and signed by the clerk and by A., as presiding justice, although the latter did not become such until October. Neither the county court nor the other justice thereof consented to A.'s act. The bonds were not registered, nor was the certificate of registration required by said act of March 30, indorsed thereon. In a suit by B., a holder for value, upon the bonds, — *Held*, 1. That he was charged with notice that A. was not presiding justice at the time they bear date. 2. That the bonds being signed by A. was equivalent to notice that they were not in fact issued before the passage of said act, and that they are consequently void.
4. *Town of Weyauwega* v. *Ayling* (99 U. S. 112) distinguished.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

The case was argued by *Mr. John B. Henderson* and *Mr. Joseph Shippen* for the plaintiff in error, and by *Mr. Alexander Graves*, *contra.*

Mr. E. J. Montague and *Mr. Fillmore Beall* filed printed arguments for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit upon interest coupons originally attached to bonds issued under the Township Aid Act of Missouri, and presents the following facts: —

On the 10th of February, 1872, the township of Marion, in

Jasper County, upon a call duly made under the law, voted to subscribe $75,000 to the stock of the Memphis, Carthage, and Northwestern Railroad Company upon certain conditions, and on the 28th of March following the county court made the subscription on the terms and subject to the conditions specified.

On the 30th of March in that year an act was passed by the General Assembly of Missouri, entitled "An Act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof." Sect. 4 of that act is as follows: —

"Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bond shall first be presented to the State auditor, who shall register the same in a book or books provided for that purpose in the same manner as the State bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds or the power of any county court, city, or town council, or board of trustees, or other authority to issue such bonds, and the remedy by injunction shall also lie at the instance of any tax-payer of the respective county, city, or incorporated town to prevent the registration of any bonds alleged to be illegally issued or founded under any provision of this act."

On the 4th of June, 1872, the county court ordered that $50,000 of the bonds which had been voted should be issued, that the clerk have them registered according to law, and, when registered, that they be deposited in escrow with some responsible banker in St. Louis.

John Purcell was the presiding justice of the court in March. He continued in office until September, 1872, when he resigned, and R. S. Merwin was appointed in his place Oct. 21, 1872. The bonds now in question were sealed with the seal of the court, affixed by the clerk, and signed by Merwin, as presiding

justice, and by the clerk in October, 1872, but antedated as of March 28. Merwin delivered them during the same month, with the first two coupons cut off, to the Union Savings Bank of St. Louis, for the use of Edward Burgess, a contractor for building the road. In November, Burgess sold them to one Wilson at fifty-five cents on the dollar, and the bank gave them up to the purchaser on his order. Neither the other justice of the county court, nor the court as a court, consented to what was done by Merwin, and the railroad company has never fully complied with the conditions of the vote authorizing the issue of the bonds. No registry of the bonds was ever made, as required by the act of March 30, 1872, and they did not have upon them the certificate of registration. Anthony, the plaintiff below, was a purchaser for value of the bonds from which the coupons sued on were cut, and without any notice that they had been antedated, or were in any respect irregular or invalid.

The Circuit Court, on this state of facts, gave judgment against Anthony, and he brought this writ of error.

All the questions presented in the argument of this case were disposed of in *Douglass* v. *County of Pike* (*supra*, p. 677), except such as arise under the act of March 30, 1872. That act, it is claimed, renders the bonds invalid, because they were not registered and had no certificate of registry on them. Against this it is urged: —

1. That the act does not apply to bonds issued under the township aid law; and,

2. That if it does, the county is estopped from denying that these bonds were actually issued on the day they bear date.

The first objection is, as we think, untenable. It does not appear to have been taken or considered below. While the bonds are township bonds, in the sense that they are payable out of taxes levied on the property in the township which voted them, they were issued by the county. The county court, which represented the county in its corporate capacity, made the subscription voted by the township, and issued the bonds in the name of the county. Under the same authority the necessary taxes are to be levied on the property in the township, and from moneys obtained in this way the county

treasurer is to pay the bonds and coupons as they mature. The bonds on their face acknowledge an indebtedness of the county "for and on account of" the township. Since townships have no corporate organization of their own they act through the county, which, for this purpose, represents them as, under other circumstances, it does the people of the whole county.

The act in question is not confined to the bonds *of* counties, but embraces all *issued* by counties. As there can be no township bonds except they are issued by counties, it seems to us that they come within the descriptive words used in the fourth section, and we have been unable to find any thing in the other parts of the act manifesting an intention to give these words any other than their usual and ordinary signification. The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities. For this purpose a new policy was adopted by the State. The evil which the General Assembly had in view affected township bonds, as well as those of counties, cities, or towns. In fact, as ordinarily the same officers put out the township bonds that did those of the county, it is impossible to discover any good reason for guarding one against frauds and mistakes rather than the other. The records of the county court should contain an account of all that has been done in this way by that body for the townships, and the chief financial officer of the county can as easily furnish the State auditor with a statement of these obligations as he can of those of the county at large. When the State auditor certifies to the county court the amount required during the next year to meet maturing coupons and costs and expenses, the special tax can be levied by the county court, under the township aid law, as amended in 1871 (Wagner's Stat. 331, sect. 52), on the real estate and personal property in the township for whose account the bonds were issued. No embarrassment can possibly arise in this particular, for there is no such conflict between the two statutes as to produce a repeal by implication. The registration statute is supplementary only to that under which the bonds were originally issued.

This brings us to consider the question of estoppel. There

can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper. The act now in question is, we think, of this character. It in effect provides that no bond issued by counties, cities, or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the State auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. When the certificate is found on the bond the purchaser need not inquire whether what has been certified to is true. As against a *bona fide* holder the public is bound by what its authorized agents have done and stated in the prescribed form.

Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of state. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarra-*

han v. *Mining Company* (96 U. S. 316) the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: "Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires." The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of state. Of this law all who deal in the bonds are bound to take notice.

In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of

an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley* v. *Taber* (5 Mass. 285), it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date.

It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law as it could have been before. All the legislature attempted to do was to provide what should be a good bond when issued. There was nothing changed but the form of the execution.

Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. This plaintiff is charged with notice of the fact that Merwin was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his official capacity until that time. Had he signed them in March, he could not have bound the township for their payment. This is equivalent to notice that they were not in fact issued before March 30, and that consequently they were not valid because not certified by the auditor of state.

This case is entirely different from *Town of Weyauwega* v. *Ayling* (99 U. S. 112), where we held the town was estopped from proving that the bonds were actually signed by a former

clerk after he went out of office; because the clerk in office adopted that signature as his own when he united with the chairman in delivering the bonds to the railroad company, pursuant to the vote of the town. There the bonds were not only complete in form at the time they bore date, but when they were actually issued as genuine by the proper agents, one of whom was the clerk who should have signed them. Here they were not actually complete in form when they were issued, and it was only by a false date inserted by one of the two agents required by law to unite in their execution, and without the knowledge or consent of the other, who never acted at all, that they were apparently so. They were never in a condition to be issued, and were never in fact issued by the proper authorities. They were in legal effect forged.

It follows that the judgment of the Circuit Court was right, and it is consequently

Affirmed.

MR. JUSTICE CLIFFORD, MR. JUSTICE SWAYNE, and MR. JUSTICE STRONG dissented.

DAUTERIVE v. UNITED STATES.

1. Where a petition was filed under the eleventh section of an act entitled "An Act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri" (12 Stat. 85), praying for the confirmation of title to a tract of land in Louisiana, and it appears that the grant, as the same is alleged in the petition, was not surveyed before the treaty of cession, and that it furnishes no means whereby its location or extent can be determined, — *Held*, that the petition was properly dismissed.
2. *United States* v. *D'Auterieve* (14 How. 14), in which the same grant was under consideration, cited and approved.

APPEAL from the District Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Edward Janin for the appellants.

The Solicitor-General, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Claimants to land lying within the States of Florida, Louisiana, or Missouri, by virtue of any grant, concession, order of survey, permission to settle, or other written evidence of title bearing date prior to the cession of the territory out of which those States were formed, may make application to certain commissioners for the confirmation of their title, or they may at their option proceed by petition in the District Court within whose jurisdiction the lands are situated. 12 Stat. 85.

Either party aggrieved by the decree in the case may appeal directly to the Supreme Court as of right, neither affidavit or security being required of the claimant, other than for costs. Pursuant to that authority the appellants presented their petition to the District Court of the District for Louisiana, asking for the confirmation of their title to the same, except as to such parts thereof as have been granted by the United States or confirmed to other parties, as to which they pray that they may be adjudged to be entitled to indemnity in certificates of location to the same extent of land.

Sufficient appears to show that the same claim was presented to the same District Court twenty years earlier, and that on appeal to the Supreme Court the claim was rejected. *United States* v. *D'Auterieve*, 15 How. 14. Full report is there given of the origin, nature, and extent of the claim, and in view of that fact it is not deemed necessary to reproduce the allegations of the petition in this opinion, as the whole substance of the same is given in the opinion of the court in that case.

Due appearance was entered in behalf of the United States in this case, and the district attorney filed an answer to the petition, setting up several defences, as follows: 1. That no such grants or mesne conveyances as those under which the petitioners claim were ever made. 2. That if any such grants were ever made as alleged, which is denied, that the lands were never separated by metes and bounds or actual survey from the mass of the public domain, and are therefore null and void by reason of uncertainty of location and vagueness of description, both as to the boundaries of the grants and to their extent.

Tracts of land of great extent were granted by royal charter

to a certain association called the Western Company, and the claim of the appellants is that that company made concession of the tract in question to the grantor of their ancestor, the tract at the date of the concession being four leagues front on the right bank of the Mississippi River and extending back to the river Atchafalaya, a distance of ten or twelve miles. Neither the royal charter granting the land to the Western Company nor the concession to the grantor of their ancestor is given in evidence. Nothing of the kind is pretended, but the appellants allege that the letters-patent, bearing date in 1717, were issued in the name of the sovereign of France, by which the said company was created, and that by the fifth article of the same all the lands, coasts, ports, havens, and islands of the Province of Louisiana were given and granted to the said company, with power to give, sell, and grant the same to others, and that the company during that year or early in the next year conveyed the tract antecedently described to the grantor of their ancestor.

Their theory is that the concession was made by the French authorities before the province was ceded to Spain. History shows that France subsequently, by a secret treaty, transferred the province to Spain in pursuance of the stipulations between the contracting parties. When the first governor under the Spanish rule visited the province he reduced the tract to a front of twenty arpents, to which no objections appear to have been made by the claimant; but the successor of that magistrate, three years later, when he assumed the functions of governor of the province, enlarged the front to forty-four arpents, which perhaps was done at the request of the claimant. Galvez was the third governor of the province after the cession to Spain, and he, in the exercise of his powers, took away from the heirs of the alleged purchaser the whole front to the depth of forty arpents from the Mississippi River, leaving them nothing except what is called in legal phrase the back lands.

Throughout these several changes in the alleged title of the ancestor of the appellants and his immediate heirs, all parties appear to have acquiesced without any complaint. Nor do the appellants now claim any of the front land on the river Mississippi, nor the four leagues, nor the forty or forty-four arpents.

Instead of that, their claim is to the back lands, the side lines commencing at a point forty arpents from the Mississippi River and extending back to the river Atchafalaya. Even as reduced the claim is a large one, amounting to perhaps five hundred thousand acres, but it is not more than one-fifteenth part of the original claim, as appear by the documents exhibited in the transcript.

3. Besides denying the authenticity of the concession, the answer also denies in the most explicit terms that the tract, as described in the evidence, ever extended back to Atchafalaya River.

4. Support to that proposition is derived in the answer by referring to the regulations adopted two years before the second governor under Spanish rule enlarged the front to forty-four arpents, which provide that all grants fronting upon rivers shall be limited to a depth of forty arpents. White's Recopilacion, p. 299, art. 1.

5. That the case is in all respects the same as that previously decided by this court. *United States* v. *D'Auterieve*, 15 How. 14, 23.

No record of the concession, say the court in that case, has been produced, and after a thorough examination of the archives, both at New Orleans and in the appropriate offices for the deposit of such records, none can be found. Mention was then made of the proof exhibited in the case, which it seems consisted only of certain historical sketches given to the public of the first settlement of the province under the direction of the Western Company, together with some documentary evidence relating to the plantation of the alleged original donee through his agents, such as powers of attorney and some intermediate transfers of the titles in the charge of the agency. These are given in detail, but the court remarks that unfortunately neither the historical sketches nor the documentary evidence furnishes any information as to the extent of the concession or its boundaries. Speaking to the same point, the court say that the tract claimed as derived from the original donee is without boundaries or location, and the court proceeds to remark that the only description that has been referred to, or which the court has been able to find after a pretty thorough search, even in historical records,

is that it was a concession of a large tract upon the right bank of the Mississippi River, opposite Manchac, a point some twenty leagues above New Orleans. We have no evidence of the extent of the concession on the river or the depth back, say the court, or of any land-marks designating the tract, by which it can be regarded as severed from the public domain.

Governor Unzaga, who succeeded the first Spanish officer of that rank, ordered a survey of the tract, and it appears it was made by the public surveyor, and that it was returned and approved in the same year. Special attention to that fact was called in the argument of the prior case, and it was urged that it furnished evidence of an incipient step to establish an incomplete title under our treaty of cession, and the court entered into a full examination of the proposition and the evidence to support it, which consisted chiefly of the field-notes of the survey.

Reference is made to the claim in some of the intermediate conveyances as a plantation or concession by the name of the first agent of the company, or by the name of the "Bayou Goula village," the name of a place on the river where the tribe of Indians of that name made their headquarters. Satisfactory evidence is exhibited that the public surveyor surveyed the front to the depth of forty arpents, but it must be remembered that the front of the tract on the river to the depth of forty arpents was given up, and that it was subsequently assigned by the governor to other emigrants, and no part of it is now claimed by the appellants.

Back concessions, it seems, were seldom made, and in no instance of which there appears to be any authentic account, except to the proprietor of the front, and where made uniformly had a depth of forty arpents, reckoning from the rear line of the first concession, but the same form of title appears to have been required in the one case as in the other, and in no case could a fee-simple estate be acquired from the government without the severance of a definite tract from the mass of the public lands under the operation of a complete grant. 4 Op. Att.-Gen. 683.

Such a severance might be made by the grant itself, if it contained specific boundaries, or was well defined by courses and

distances, or other authentic and definite description of the tract. It is not pretended that either boundaries or courses and distances, or any other authentic or definite description of the tract, was given in the supposed concession. Where such evidence of the location and description of the tract is wanting in the concessions, they may and often have been supplied by what is called a judicial survey, nor is it doubted that an official survey under the order of the governor might have a like effect.

Beyond doubt, such a survey was made of the front on the river; but this court decided, in the case already referred to, that there is not the slightest pretence that the tract as surveyed under that order of the governor extended back further than the usual depth of forty arpents from the river. No support to the theory of the appellants that it extended back to the river Atchafalaya is exhibited in the record. Nor do the field-notes or the *proces verbal* of the surveyor who made the field-notes and the survey give the proposition the least countenance.

Under our treaty of cession the United States acquired in sovereignty all the lands in the province which had not before been granted by one or the other of the two prior sovereigns and severed as private property from the royal domain. It was incumbent, therefore, upon the appellants to show that the land in question had been so granted by the antecedent authorities, else the United States are entitled to recover it. *United States* v. *King*, 7 How. 833, 849.

Subsequent concessions were made by the Spanish authorities within this claim, which, as well as the action of the authorities in resuming the possession of the larger portion of it, show conclusively that no such right as is now claimed by the appellants was recognized by those authorities.

Since the cession of the province, the right of such a claimant is the same as it would have been if the jurisdiction had not been transferred, from which it follows that rejected claims, which had no validity at the date of the treaty, impose no obligation upon the United States as the successor of the foreign sovereign.

Cases of the kind have frequently been before the court, in

which the act of Congress authorizing such litigations has been construed and the rights which it confers defined. We adopt the construction given to the act in the last-reported case upon the subject, as follows: 1. That the claimant or those under whom he holds must have been out of possession for twenty years or more. 2. That the land must be claimed by a complete grant or concession or order of survey or other mode of investiture of title in the original claimant by separation of the tract from the mass of the public domain, either by actual survey or defined, fixed natural boundaries or initial points and courses and distances by the competent authority, prior to the treaty of cession. 3. That those conditions do not apply where the title was created and perfected during the period of the actual possession of the government under which the claim is asserted. Titles in fee-simple which were complete when the jurisdiction of the province was transferred to the United States needed no confirmation, as they are fully protected by the treaty of cession. *United States* v. *Percheman*, 7 Pet. 51, 88; *United States* v. *Wiggins*, 14 id. 334, 349. 4. That the title must be complete under the former sovereign, that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise; that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*, or, in other words, the separation of the tract from the public domain must not be a mere conjectural separation, but complete, without any element of discretion or uncertainty. *Scull* v. *United States*, 98 U. S. 410, 418; *Smith* v. *United States*, 10 Pet. 326, 334.

Apply those rules to the case before the court, and it is clear that the decree of the court below must be affirmed. Even if it be conceded that the concession is proved, it is clear that it has no boundaries, nor does it contain any means to determine either the location or the extent of the supposed grant.

Grants of the kind which do not contain any description by which the land can be located, and are not connected with a sur-

vey, do not create private property under the treaty of cession. Where the concession contains no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain, the claim of the donee cannot be sustained, it having been repeatedly decided by this court that if the description is vague and indefinite, as in the case before the court, and there is no official survey to give it a certain location, it will create no right of private property which can be maintained in a court of justice. *United States* v. *King*, 3 How. 773, 787.

Legal survey will often be sufficient to establish the locality of the tract, and may have the effect to establish its extent; but if the claimant shows no survey under the former sovereign, it lies on him to establish the boundaries of his concession and to identify his land with such certainty as to show what particular tract was segregated from the public domain, and if he fails to do it, then he has no judicial remedy, and if he seeks confirmation he must go to Congress. *United States* v. *Boisdoré*, 11 How. 63, 96; *Lecompte* v. *United States*, 11 id. 115, 127; *United States* v. *Forbes*, 15 Pet. 173, 184.

Attempt is not made to show that the supposed concession contained any definite boundaries or any other means of establishing its locality or of defining its extent, nor is it pretended that the tract as now claimed by the appellants was ever surveyed by the public surveyor antecedent to the treaty of cession to the United States. Conclusive proof to the contrary is exhibited in the opinion of this court delivered by Mr. Justice Nelson, which conclusion is fully sustained by the field-notes of the survey of the front, and by the *proces verbal* and the figurative plan exhibited in the transcript.

Decree affirmed.

MOULOR *v.* INSURANCE COMPANY.

In an action upon a life policy, where the defence is set up that some of the answers to the interrogatories contained in the application for insurance are untrue, and the evidence is conflicting, the court should not direct the jury to find for the defendant.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This action was brought by Emilie Moulor, widow of Louis Moulor, against the American Life Insurance Company, upon a policy of insurance upon his life issued June 17, 1872. The instrument contains the following stipulation: "And it is hereby declared and agreed that if the representations and answers made to this company in the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in such case, this policy shall be null and void." The application contains the following interrogatories and answers, among others: "Seventh. Has the party" (Louis Moulor) "ever been afflicted with any of the following diseases? Answer 'yes' or 'no' to each. Insanity? No. — Gout? No. — Rheumatism? No. — Palsy? No. — Scrofula? No. — Convulsions? No. — Dropsy? No. — Small-pox? No. Yellow fever? Yes. — Fistula? No. — Rupture? No. — Asthma? No. — Spitting of blood? No. — Consumption? No. — Any diseases of the lungs or throat? No. — Or of the heart? No. — Or of the urinary organs? No."

Interrogatory twelfth. "How long since the party was attended by a physician? For what disease or diseases?" Answer. "Not since the year 1847, when he had the yellow fever."

After these answers the application contained the following: "It is hereby declared and *warranted* that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned" (Louis Moulor) "that this application shall form a part of the contract of insurance, and that if there be in any of the answers herein made any untrue or evasive statements, or any misrepresentations, or concealment of facts, then any policy granted upon this application shall be null and void."

The defence set up at the trial was that some of the answers to the interrogatories contained in the application were untrue, and this defence was attempted to be supported by the testimony of a single witness, Dr. Mathieu. He testified that he had been the family physician of Moulor since 1855; that in 1858 and 1859 he attended Moulor for chronic asthma, manifestations of the first stage of consumption, and also treated him for scrofula. The witness did not testify positively that Moulor had the diseases for which he treated him, but his testimony was that Moulor never learned from him or any other physician, and that he never suspected or had the remotest idea that he was affected with any such diseases; on the contrary, that he always boasted of himself as being a strong, healthy, and robust man. The witness further testified that the asthma Moulor had was the dry, nervous asthma, attended by no expectoration; that there was nothing connected with it to make the patient believe he had it. As to the first stage of consumption, there was no softening of the tubercles, and, therefore, no expectoration of the tuberculous matter. As to the scrofula, that his was very mild diathesis.

This was all the testimony adduced, and now relied upon to prove that the answers in the application were untrue.

There was, however, in evidence the statement of two medical examiners attending the application. They represented the assured as in perfect health, and as having never had any constitutional disease except yellow fever, and a curvature of the spine in his early youth, and as having no predisposition, either hereditary or acquired, to any constitutional disease.

The court instructed the jury to find for the defendant. Judgment having been rendered accordingly, the plaintiff sued out this writ.

Mr. James Parsons for the plaintiff in error.

Mr. Isaac Haslehurst and *Mr. Henry Hazlehurst* for the defendant in error.

MR. JUSTICE STRONG, after stating the facts, delivered the opinion of the court.

As the judgment which was entered by the Circuit Court was in accordance with the verdict, the only assignment of

error which we have to consider is the first, namely, that the court erred in giving to the jury a binding charge to return a verdict for the defendant.

We are of opinion that the evidence did not warrant a peremptory instruction to the jury to find a verdict in favor of the defendant. The testimony of Dr. Mathieu was parol. Its credibility as well as its effect was for the jury, especially as it was not positive and unqualified that Moulor had had the diseases for which the witness had treated him, and as the statements of the examining physicians which were in evidence tended in some degree to prove that he never had. The jury might, perhaps, have drawn the conclusion from Dr. Mathieu's testimony that there had been only predisposition to the diseases, and not the diseases themselves. He stated in regard to the asthma for which he treated Moulor that it was attended with no expectoration, and that there was nothing connected with it to make the patient believe he had it. In regard to the first stages of consumption, according to his statement there was no expectoration of tuberculous matter. He does not state that there was any cough or pain in the chest. There were, then, no external symptoms of either of the three diseases mentioned. Had scrofula existed, it would seem probable the patient must have known it. Yet the doctor states he did not suspect, or have the remotest idea, that he was affected with either of the diseases. That he was treated for them is not conclusive that he had them. The most skilful treatment sometimes is given when the existence of a particular disease is only suspected, not known, and when afterwards it appears the physician was mistaken.

For these reasons we think the testimony was not such as to justify a withdrawal from the jury of the inquiry whether the answer to the seventh interrogatory was untrue.

Nor was it sufficient to enable the court to conclude, without reference to the jury, that the answer to the twelfth interrogatory was untrue. The entire interrogatory should be considered as one. It was, "How long since the party was attended by a physician? For what disease or diseases?" To this the answer was, "Not since the year 1847, when he had the yellow fever." It may well be that the applicant understood the

interrogatory as asking information respecting attendance for a particular disease or diseases and their description, especially as the thirteenth interrogatory sought information respecting the party's *usual medical attendant*, and the name of that attendant was truly given.

Upon the whole, therefore, we think the case should have been submitted to the jury on the evidence.

Judgment reversed, and the cause remitted for a new trial.

EX PARTE RAILWAY COMPANY.

1. This court will not by *mandamus* revise the action of inferior courts acting within the scope of their authority touching any matter about which they must exercise their judicial discretion.
2. A petition was presented for a *mandamus* to the Circuit Court of the United States for the District of Colorado in the matter of the proceedings had subsequently to its receipt of the mandate ordered in *Railway Company* v. *Alling*, 99 U. S. 463. They are mentioned *infra*, pp. 715–717. *Held*, that the case is not one which calls for interposition by *mandamus*.

PETITION for *mandamus*.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Roscoe Conkling* and *Mr. Samuel Shellabarger* for the petitioner, and by *Mr. Sidney Bartlett* and *Mr. George O. Shattuck*, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an application, by petition, for a writ of *mandamus* to the judges of the Circuit Court of the United States for the District of Colorado, commanding them to proceed and give final decree, in accordance with the opinion and mandate of this court, in the suit of the Cañon City and San Juan Railroad Company against the Denver and Rio Grande Railway Company. The history of this litigation is set forth in *Railway Company* v. *Alling* (99 U. S. 463), to which reference is here made. The present application is supported by an exemplified copy of the proceedings had in the Circuit Court at its May

Term, 1879, after the filing therein of the opinion and mandate of this court.

The main contention of the Denver and Rio Grande Railway Company was that the court below had failed and refused to comply with the mandate of this court; that, upon filing the mandate, that company became entitled absolutely, and beyond the discretion of the Circuit Court, to a decree restoring it, at once and unconditionally, to the possession of the Grand Cañon of the Arkansas River; dissolving the injunction granted against it in that suit; adjudging that it had the prior right to occupy and use that cañon for the purpose of constructing its railroad therein; and requiring the Cañon City and San Juan Railway Company, its officers, agents, servants, and employés, to refrain from interfering with or obstructing the Denver and Rio Grande Company in such occupancy and use of the cañon, or in the construction of its railroad in and through the same.

It is essential to a proper understanding of the present application to recall some of the leading facts in this litigation. The controversy between these two companies arose out of their respective claims to occupy and use the Grand or Big Cañon of the Arkansas River for railroad purposes. The Circuit Court, upon the original hearing, held the prior right and location to be with the Cañon City Company, with liberty, however, to the Denver Company to exhibit its bill in any court of competent jurisdiction to compel the former company to so locate and construct its road as to permit the convenient and proper location by the Denver Company of its road, or, if two roads could not be conveniently constructed and operated in the cañon, to occupy the track and roadway of the Cañon City Company. While the causes were under submission in this court at its last term, it was represented that, after the rendition of the decree in favor of the Cañon City Company, the parties and corporations concerned had entered into binding agreements, whereby the Atchison, Topeka, and Santa Fé Railroad Company, in its own right, and in connection with the Pueblo and Arkansas Valley Railroad Company (the successor of the Cañon City Company), had become and was equitably the owner of all the property, rights, and interests of the Den-

ver Company, and entitled to the control of its affairs, business, and suits of every kind. Upon that ground, the Pueblo Company moved that the submission be set aside, and the appeals dismissed, while the Atchison Company moved that it have permission to intervene in this court, and, by its solicitor, consent to such dismissal.

These motions were denied, for the reasons given in the former opinion. It was there said, that if the directors of the Denver Company, in prosecuting the appeals to final judgment, violated any trust committed to their hands, or any agreement which was binding upon the corporation and the minority stockholders, remedy might be sought "in some court of original jurisdiction, into which, upon proper pleadings, all persons interested may be summoned." The court also said: "If, since those decrees were entered, the Atchison, Topeka, and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company have, by valid contracts, acquired a controlling interest in the property, rights, and affairs of the Denver Company, that interest can be asserted by appropriate proceedings, and will not be affected by any thing we may determine upon the issues presented by these appeals."

Upon the merits of the cases it was held —

That the intention of Congress by the act of 1872 was to grant to the Denver Company a present beneficial easement in the particular way over which its designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the company's charter and the act of Congress;

That when such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant;

That the Denver Company, by its occupancy of the Grand Cañon on 19th April, 1878, for the purpose of constructing its road through that defile, came then, if not before, into the enjoyment of the present beneficial easement conferred by the act of Congress of June 8, 1872, and was entitled to have secured, against all intruders whatever, the privileges or advantages which belonged to that position;

That such right was, however, subject to the provisions of the act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company, duly organized, might use and occupy the cañon for the purposes of its road, in common with the road first located.

The opinion concluded as follows: —

"It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Cañon. The decree, as entered, can only be sustained upon the assumption that the Cañon City Company had by prior occupancy acquired a right superior to any which the Denver and Rio Grande Railway Company had to use the cañon for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by the acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other company. Where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road. Further, if in any portion of the Grand Cañon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that tract for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 3, 1875, to use the same road-bed and track, after completion, in common with the Denver Company.

"The decrees in these causes are, therefore, reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each suit, the

court below will recognize the prior right of that company to occupy and use the Grand Cañon for the purpose of constructing its road therein, and will enjoin the Cañon City and San Juan Railway Company, its officers, agents, servants, and employés, from interfering with or obstructing that company in such occupancy, use, and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the decrees appealed from, the Cañon City and San Juan Railway Company has, under the authority of the Circuit Court, constructed its road-bed and track in the Grand Cañon, or in some portion thereof. In that event, the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

"The court will make such further orders as may be necessary to give effect to this opinion."

It appears from the transcript of the proceedings had in the court below, after the return of the causes, that the Pueblo and Arkansas Valley Railroad Company was permitted, against the objection of the Denver Company, to file supplemental bills, showing that it was the successor of the Cañon City Company, and setting out in detail, among other things, the same facts substantially that were relied upon in this court in support of the motions made at the last term to set aside the submission and dismiss the appeals. The prayer of the first supplemental bill was that those facts might be considered, and that upon the hearing the original decrees might be permitted to stand without modification or change.

An order was entered in the Circuit Court, on the 14th of July, 1879, in which, after reciting the mandate of this court, and the reversal of the original decree of July, 1878, it was declared that the said decree theretofore given and allowed "be vacated and set aside," with costs to the Denver Company to the date of the filing of the mandate.

It was also adjudged that the right of the Denver Company "to first locate and construct its railway upon the way mentioned and described in the bill of complaint herein, as against the Cañon City and San Juan Railway Company and the Pueblo

and Arkansas Valley Railroad Company, and as of the date of the commencement of this suit, and the date of said decree, is recognized and established."

The decree proceeds: —

"Forasmuch, however, as it is alleged by the said plaintiff [the Cañon City and San Juan Railway Company], in certain supplemental bills by it filed herein, that since the said decree the said defendant [the Denver and Rio Grande Railway Company] hath granted, sold, or otherwise yielded to the said plaintiff its right of way in the premises; and forasmuch as it is also alleged by the said plaintiff that since the said decree the said plaintiff hath built wholly or in part upon the said way, and upon the line heretofore located by the said defendant, a railway of such gauge and structure as the said defendant hath proposed to build, for which, as to the whole or some part thereof, the said defendant ought in equity and good conscience to pay the reasonable value, and because the value of said railway is at present unknown to the court, no further decree touching the ultimate right of the parties can be given or allowed until the court shall be better advised in the matters aforesaid.

"And it is considered by the court that the relations of the parties of and concerning the line of railway heretofore constructed, or now in process of construction as aforesaid, ought not to suffer any change pending such inquiry touching the facts upon which the further and final judgment and decree of the court will be given; therefore, let each of the parties be enjoined and restrained from doing any act or thing towards building and completing the said line of railway until the further order of the court. Nor shall either of the said parties interfere with the present possession of the other in the said line of railway, but each shall remain in the possession of that part which it now holds until the further order of the court. And of this order the parties shall take notice without writ or further service. But if either of the said parties shall desire to construct another line of railway on the same right of way, without interfering with the grade or road-bed constructed by the said plaintiff or the Cañon City and San Juan Railway Company, it shall be at liberty to do so."

The order then provided for the appointment of three engineers, — one to be nominated by each of the parties, and one to be selected by the court, — who were required to ascertain and report to the court to what extent, in the construction of two roads from Cañon City to the twentieth mile post, must the two companies occupy the same track; whether the Grand Cañon of the Arkansas was broad enough to enable both companies to proceed without interference with each other in their respective roads, or if one be already constructed, then whether such constructed line will interfere with or render impracticable the construction of a second line; whether in the narrow portions of the cañon there is any place where such a course was impracticable, and if so, whether any road-bed or railroad has been constructed in such place or places, and the cost and reasonable value of same; whether, if two roads shall be built on the Arkansas River from Cañon City to the twentieth mile post, to what extent should they be located on opposite sides of the river, and the relative cost thereof; what has been done by the Cañon City Company or the Pueblo and Arkansas Valley Railroad Company towards constructing a railroad from Cañon City to the twentieth mile post, and what is its value and its location, with reference to the Arkansas, its defiles and cañons, and what part of the line so constructed is on the public domain, what part on lands owned by individuals or corporations, and what is the value of each part separately.

Upon a subsequent day of the same term the Denver Company, by petition, suggested that the decree rendered was not full and complete, and that the court had not awarded all the relief to which it was entitled under the opinion and mandate of this court. The Circuit Court, however, held that further and final decree should be deferred until the matters set forth in the decree of July 14, 1879, were determined.

Thus stood the case, in its essential features, when the petition for *mandamus* was filed in this court. Subsequently, the attention of the court was called to the final decree rendered in the Circuit Court in January, 1880.

After a careful consideration of all that has been said in support of the present application, we are of opinion that a *mandamus* should be denied. Our former opinion discloses the fact

that many matters growing out of this litigation were necessarily left undisposed of, and were remitted to the Circuit Court for such determination as the rights and equities of the parties required under the circumstances existing at the time its action was invoked. We took care to say that nothing determined upon the issues presented upon the original appeals would affect the question as to whether the Atchison, Topeka, and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, had, subsequently to the decree of July, 1878, become, by valid contract, the owner of the property, or entitled to the control of the rights, affairs, and suits of the Denver Company. That question, in distinct terms, was left open for subsequent adjudication, in a court of original jurisdiction, upon proper pleadings and by appropriate proceedings. We expressly limited our decision to a determination of the rights of the parties as they existed when the decrees of July, 1878, were rendered, and as manifested in the records then before us. Whether, therefore, the supplemental bills, filed upon the return of the causes, raised, in proper form, the question as to the right of the Atchison, Topeka, and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, under the alleged contracts made with the Denver Company subsequently to the decrees of July, 1878, to control the pending suits so far as they affected the interests of the latter company, — whether the Denver Company, in consequence of said alleged contracts, had lost or waived the right, improperly denied to it by the decree of July, 1878, of occupying the Grand Cañon for the purpose of constructing its road, — were matters about which the Circuit Court was at liberty, and was bound to exercise its judicial discretion.

It is contended that the Circuit Court plainly disobeyed our mandate when declining to make such orders as would place the Denver Company, upon the filing of the mandate, in the actual occupancy or possession of the Grand Cañon, without reference to, or without awaiting the determination of, the claim which the Cañon City Company, or its successor, had on account of money expended in the construction of its road in the Grand Cañon, or in that portion of it which admitted of but one roadbed or track. It is true that we said — referring necessarily to

the rights of parties as they existed at the date of the decree of July, 1878 — that the Circuit Court erred in enjoining the Denver Company from constructing its road in the Grand Cañon; and that that company should have been allowed to proceed without obstruction from or interference by the latter company. We, therefore, directed, among other things, that the order granting the injunction should be set aside, and that, by proper orders, the prior right of the Denver Company to occupy and use the cañon be recognized. These directions were substantially complied with. The prior right of the Denver Company to locate and construct its railway in the cañon was expressly recognized and established by the order of July 14, 1879. It is true that the injunction was not, in terms, dissolved, but the final decree of July, 1878, upon which its efficacy depended, was expressly vacated and set aside. The injunction necessarily fell with the decree. The foundation upon which it rested was destroyed when the decree was annulled. Had our directions gone no farther than to dissolve the injunction against, and to recognize the prior right of, the Denver Company, the present application would rest upon stronger grounds than it does. We could not, however, ignore the fact that, possibly, during the pendency of these causes in the court below, or subsequently to the decree of July, 1878, the Cañon City Company, or its successor, had, under the authority or sanction of the court, expended money in the construction of its road-bed and track in some portions of the Grand Cañon. "In that event," we said, "the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad purposes may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require." We gave no direction as to the mode in which such cost should be ascertained, or as to the terms and conditions to be imposed in any provision made for it. Those matters were left for the determination of the court below, according to the principles of equity.

It was undoubtedly competent for that court, in the exercise of its judicial discretion, to have put the Denver Company, upon the filing of the mandate, into immediate possession of the Grand Cañon, including the road-bed and track which the Cañon City

Company had constructed in the narrow portions of that defile. But the propriety of orders to that effect would have depended upon the equities of the parties as they existed at the time the action of the court, in that direction, was sought. It was not in violation of our mandate that the Circuit Court, after setting aside and vacating the decree of July, 1878, and recognizing the prior right of the Denver Company, should suspend further action as to the ultimate rights of the parties until the matters set out in the supplemental bill, and recited in the decree of July 14, 1879, were inquired into.

We recognize, in its fullest extent, the power of this court, by *mandamus*, to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. "The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority." *Ex parte Taylor*, 14 How. 8; *Ex parte Many*, id. 24; *United States* v. *Lawrence*, 3 Dall. 42; *Life and Fire Insurance Company of New York* v. *Wilson's Heirs*, 8 Pet. 291; *Ex parte Hoyt*, 13 id. 279; *Ex parte Myra Clarke Whitney*, id. 404; *Ex parte Newman*, 14 Wall. 152. The remedy for any errors committed by the Circuit Court, either in the decree of July 14, 1879, or in the final decree of January, 1880, is by appeal to this court. We therefore forbear, at this time, any expression of opinion as to the existence or non-existence of errors in those decrees to the prejudice of either party. We decide nothing more, upon the present application, than that this is not a case which, in our judgment, calls for interposition by a writ of *mandamus*.

One of the reasons assigned in oral argument why the application for *mandamus* should be favorably considered, is that by the act of Congress of March 3, 1877, amending the act of June 2, 1872, the time within which the Denver and Rio Grande Railroad Company must complete its road as far south as Santa Fé, will expire on June 2, 1882; in default whereof, it will forfeit, as to the unfinished portion of the road, the rights and privileges granted by the act of 1872. The time limited, it is

urged, will expire before an appeal from the final decree of Jan. 2, 1880, can be reached upon the docket of this court in the usual course of its business.

We recognize the force of this suggestion, and feel it to be our duty, under the circumstances, to afford the parties an opportunity to secure an early and final determination of their respective rights in the premises. To that end, upon an appeal being perfected, and upon the filing in this court of a transcript of the record, we will hear a motion to advance this cause for consideration at the present term.

Mandamus denied.

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, and MR. JUSTICE BRADLEY dissented.

MR. JUSTICE FIELD. I dissent from the order of the court denying the *mandamus* prayed. When the Circuit Court dissolved the injunction restraining the Denver Company from taking possession of the Grand Cañon, there was only a seeming compliance with our mandate, for soon afterwards the court restored the injunction, thus practically defeating our judgment. But as the court has decided to advance the hearing of the appeal from the final decree entered in the court below, on application of the appellants, I will refrain from further comment until that appeal is heard.

PHILLIPS v. GILBERT.

1. A mechanic, pursuant to his contract with the owner of certain lots in the city of Washington, erected a row of buildings upon them. *Held*, that he did not lose his lien because his notice claimed it upon the property as an entirety, without specifically setting forth the amount claimed upon each building.
2. Where a bill is filed to enforce the lien, and the latter is discharged by the owner's written undertaking, with surety approved by the court, that he will pay the amount recovered with costs, — *Held*, that the decree *in personam* for the amount due the mechanic can be taken only against the owner.
3. The remedy of the mechanic against the surety is by an action at law upon the undertaking.

APPEAL from the Supreme Court of the District of Columbia.
The facts are stated in the opinion of the court.

Mr. George F. Appleby for the appellant.
Mr. Enoch Totten and *Mr. S. R. Bond* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The controversy in this case is as to the validity of a mechanic's lien claimed by the appellant upon certain houses and lots in the city of Washington. The defendant, Gilbert, in August, 1871, was the owner of the lots, and proposed to erect a row of brick buildings thereon, and agreed with the appellant that the latter should find the materials and build the houses (six in number) for the aggregate price of $82,000, to be paid by instalments as the work progressed. Phillips, the appellant, commenced the houses, and proceeded in their construction until the amount accruing to him was upwards of $12,000; when, the payments being behind, and certain incumbrances on the property not being lifted, as Gilbert had agreed they should be, he, Phillips, on the 23d of May, 1872, filed a mechanic's lien pursuant to the act of Congress then in force. This act, passed Feb. 2, 1859 (11 Stat. 376), declared that any person who should, by virtue of a contract with the owner of any building, perform labor or furnish materials for the construction or repair thereof, should, upon filing the proper notice, have a lien upon the building and the lot upon which it was situated. The notice of lien was required to be filed in the office of the clerk of the District Court at any time after the commencement of the building, and within three months after its completion; and the clerk was required to record it. The act declared that such liens should have precedence over all other liens or incumbrances which attached upon the premises subsequently to the time of giving the notice. For enforcing the lien the act provided a summary action at law and an execution against the premises, with a provision, in the eleventh section, that the defendant might file a written undertaking, with surety to be approved by the court, to the effect that he would pay the judgment that might be recovered, and costs, and thereby release the property from the lien. By a subsequent act, passed Feb. 23, 1867 (14 Stat. 403), it was declared that the proceed-

ing to enforce any lien should be by bill or petition in equity, and that the decree, besides subjecting the thing upon which the lien had attached to the satisfaction of the plaintiff's demand against the defendant, should adjudge that the plaintiff recover his demand against the defendant, and have execution as at law.

The bill was filed under this act on the 11th of June, 1873, and set forth the original contract, the performance of the work to the amount (as alleged) of $16,000, of which $5,000 was claimed to be unpaid, the filing and recording of the lien; and the further facts, that Gilbert had executed certain deeds of trust on the property to secure certain loans specified in the bill, and that on the sixteenth day of December, 1872, he had conveyed the entire property to the defendants, Boughton & Moore; and that on the 1st of February, 1873, Boughton & Moore executed six deeds of trust, one on each house and lot, to trustees, to secure six certain notes payable to the defendant, the Connecticut General Life Insurance Company; and prayed an account and a sale of the property, payment, and general relief. The defendants were Gilbert, Boughton & Moore, the Connecticut Insurance Company, and the trustees in the several deeds of trust.

On the 25th of June, 1873, the defendants filed an undertaking entered into by Gilbert, Boughton, Moore, J. G. Bigelow, and one W. J. Murtagh; Bigelow being, as it appears, the agent of the Connecticut Insurance Company in effecting the loan for which the six last deeds of trust mentioned in the bill were given as security. The substance of this undertaking was, that the undertakers would pay any judgment that might be rendered (including costs) upon or on account of the claim for lien made by the complainant. No further notice of this undertaking seems to have been taken in the proceedings.

Boughton & Moore demurred to the bill, mainly on the ground that the claim for lien was void because made in gross upon six separate lots, without specifically setting forth the amount claimed upon each.

Gilbert filed an answer averring that the complainant had been fully paid for all the materials and work furnished by him; and the Connecticut Insurance Company filed a separate

answer, setting up their loan upon the property, the amount of which they stated to be $36,000; and alleging that, when they made this loan, Phillips, the complainant, executed and delivered to them a release of the lots from the effect and operation of his lien; and that upon the faith of this release they made the loan to Boughton & Moore; and they insisted that the complainant was estopped from proceeding on his claim for lien. They further stated that the release, together with the abstract of title with which it was placed, had been lost or mislaid; and they annexed to their answer a paper, which they averred to be a substantial copy of said release. This answer was verified by the affidavit of Bigelow. The alleged copy of release was dated Jan. 10, 1873, and purported to be directed to the clerk of the Circuit Court, requesting him to release the property in question from the mechanic's lien filed by Phillips on the twenty-third day of May, 1872. Thereupon Gilbert filed an amendment to his answer, alleging that he was informed and believed that such a release had been made by the complainant.

Replications being duly filed, the parties went into proofs.

On the 30th of March, 1874, an issue was directed to be tried by a jury to ascertain whether Gilbert was indebted to Phillips for work and materials in the construction of the buildings in question; and if indebted, how much, after deducting all payments and set-offs. Upon this issue the jury, on the 14th of June, 1875, found that Gilbert was indebted to Phillips for the cause aforesaid, after deductions, in the sum of $4,020.

Upon a final hearing upon the pleadings and proofs, the bill was dismissed, and Phillips appealed here.

Besides the question of indebtedness, the principal contest upon the proofs was whether Phillips had executed a release as set up in the answer of the Insurance Company, so as to estop him from claiming any lien upon the premises. That he did execute some paper of the kind was admitted by himself when examined as a witness; but his allegation is that he had bid off the property at a trustee's sale in November, 1872, and that the paper executed by him was given to Bigelow, the company's agent, for the purpose of raising a loan to himself; but that another arrangement was made whereby he gave up his bid, and never received a deed for the property, and aban-

doned his application for the proposed loan; and that Gilbert induced Boughton & Moore to purchase the property, and the loan was made by the Insurance Company to Boughton & Moore; and he, Phillips, was induced to go on with the building of the houses for them on the same terms upon which he had engaged to do it for Gilbert, but upon the distinct understanding that the amount due him, and for which he held his lien, should be paid out of the moneys received from the Insurance Company; that he never intended to give up his lien unless he had got the loan himself, or was paid the amount due him.

Without going into an examination of the testimony on this subject, it is sufficient to say that we have come to the conclusion that the facts were substantially as contended by Phillips, and that the agent of the Insurance Company knew perfectly well that Phillips never intended to give up his lien after his negotiation for a loan fell through. We are, therefore, of opinion that he was not estopped by the paper referred to, which seems to have unaccountably disappeared, and the contents and date of which are not clearly proved.

We are satisfied, therefore, that when this suit was commenced the complainant's lien was good against the property for the amount found by the jury to be due to him, unless it was void for the reason stated in the demurrer of Boughton & Moore; namely, its being claimed on the whole row of buildings, and not on the buildings separately. We think, however, there is nothing in this objection. The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building, within the meaning of the law, from having been united by the parties in one contract, as one general piece of work.

We are clear, therefore, that a decree ought to be entered in favor of the complainant against Gilbert personally for the amount found to be due to him, with interest from the date of the verdict.

The effect of the undertaking filed in the suit was to release the property from the lien, and to oblige the complainant to have recourse for security of payment to the parties who entered into said undertaking. It would facilitate the ends of

justice if a decree could be made at once against the undertakers, as is done against stipulators in admiralty proceedings. But we find no precedent for such a course upon a bond or undertaking given by way of indemnity in proceedings at common law or in chancery, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognisance, which is matter of record.

Our conclusion, therefore, is, that the decree of the Supreme Court of the district must be reversed, and the cause remanded with instructions to enter a personal decree in favor of the complainant against the defendant Gilbert, for the amount of $4,020, with interest and costs; and that execution issue thereon; and further, to decree that the lien claimed by the complainant was a valid lien at the commencement of this suit; but that, by reason of the undertaking filed in the cause, the buildings and lots mentioned in the pleadings became released and discharged from the lien; and that the complainant have leave to proceed at once upon said undertaking in an action of law to be brought for that purpose; also, that the complainant have a decree for the costs against the defendants Gilbert, Boughton & Moore, and the Connecticut General Life Insurance Company of Hartford; and it is

So ordered.

UNITED STATES *v.* KIMBALL.

1. A collector of internal revenue, when sued on his bond for the balance of taxes charged to him under sect. 3218, Rev. Stat., is entitled to a credit for all uncollected taxes he transferred to his successor, if he proves that he used due diligence to collect them.
2. The certificate of the Commissioner of Internal Revenue, that the collector used such due diligence, is a condition precedent to the allowance of a credit on the books of the treasury by the First Comptroller, before the suit was brought, but not to a defence upon the trial.
3. The rejection by the Commissioner of a claim for such credit presented by the collector entitles the latter, when sued for such taxes, to prove his claim.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action brought by the United States upon the bond of a collector of internal revenue. The breach assigned was his failure to pay over the balance alleged to be due July 1, 1871, for stamps and other property transmitted to him by the proper officers of the government, and for public moneys which he had collected.

The plaintiff put in evidence a certified account from the books of the Treasury Department showing the balance due. It appears that, on going out of office, the collector turned over to his successor a list of uncollected taxes to that amount. Evidence was introduced tending to show that he had used due diligence to collect them, and applied to the Commissioner of Internal Revenue for a credit to the amount of them. His claim to a credit was rejected by that officer.

The court charged the jury, in substance, that the collector, having made an unsuccessful application to the proper department for the credit, had a right to make claim therefor on the trial, if under the law and the facts he was entitled to it.

The court refused to instruct the jury that the receipt of the collector's successor in office showing such lists was not entitled to weight as evidence, unless accompanied by the certificate of the Commissioner of Internal Revenue or the First Comptroller of the Treasury, that due diligence had been used by the collector; and as no such certificate was offered in the case, the receipt should be disregarded by the jury.

The United States excepted to the charge given and to that refused. Judgment was rendered for the defendant, and the United States sued out this writ.

Mr. Assistant Attorney-General Smith for the United States.

There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In a suit against a collector of internal revenue on his bond for a balance of taxes charged to him under the provisions of sect. 3218, Rev. Stat., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection.

The certificate of the Commissioner of Internal Revenue is a condition precedent to a credit by the First Comptroller of the Treasury before suit, but not to a defence upon the facts if a suit is brought.

The presentation to the Commissioner of Internal Revenue by a collector of a claim for credit in his account, and its rejection by him, is such a presentation of the claim "to the accounting officers of the treasury for their examination," and disallowance by them, as will permit the collector, under sect. 951, Rev. Stat., to make proof of his claim in a suit brought against him by the United States to collect what is due from him on his account.

Judgment affirmed.

MEYER v. HORNBY.

1. The ruling in *Brooks* v. *Railway Company* (*supra*, p. 443), that work done by a contractor upon a part of a railroad then in process of construction entitles his lien, under the laws of Iowa, to precedence over that of a prior mortgage upon the entire road, reaffirmed.
2. The contractor was a stockholder in a construction company, which, when it placed on the market the bonds secured by the mortgage, gave a guaranty that the local subscriptions and grants would be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency. *Held*, that he was not thereby estopped from setting up his lien, as against the mortgagee.
3. If the holders of the bonds sustained any loss by reason of the guaranty, the company which gave it is liable in damages.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are sufficiently stated in the opinion of the court.

Mr. James Grant and *Mr. Joseph H. Choate* for the appellants.

Mr. James T. Lane for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

Appellants, as trustees in a railroad mortgage, brought suit to foreclose it, and made Hornby a defendant. He set up a claim

to a mechanic's lien, which was allowed. The mortgagor and owner of the road was the Davenport and St. Paul Railroad Company, incorporated to build a road from Davenport, in Iowa, to St. Paul, in Minnesota. The mortgage, executed May 16, 1872, embraced the entire line of road, and all present and after-acquired property therewith connected. The route was surveyed from Davenport to St. Paul, and work some three miles out from the city of Davenport was commenced and prosecuted in the direction of St. Paul, until about forty-eight miles were completed. When this work was begun, the part of the road surveyed in Scott County, from Davenport to Pine Hill Cemetery, included a difficult and expensive ascent from the river-bottom, on which the town is mainly situated, to the prairie land above the bluff. Its construction was for this reason delayed, and a temporary running arrangement made with another company, by which the cars from the country came into the city. The work on that piece of road was, however, commenced on a contract with Hornby, of date of Oct. 9, 1872, and finished prior to the first day of November, 1873. On the 28th of that month he filed his claim for a mechanic's lien in the proper court. The mortgage was recorded in that county, Dec. 24, 1872, but Hornby knew of its existence when he made the contract under which he claims his lien.

Two objections are taken to this lien. One of them is that Hornby himself was a stockholder in the Davenport Railway Construction Company, a corporation which placed the bonds secured by appellants' mortgage on the market, and which gave a guaranty that the local subscriptions and grants should be sufficient to prepare the road for the reception of the rails, and undertook to make good any deficiency in such local aid. Six gentlemen also signed an agreement to be personally bound to make good the guaranty of the construction company. Hornby was not one of them, and it is not charged that he ever made any personal representations on the subject to purchasers of the bonds or to any one else.

But it is argued that because he was a stockholder of the construction company he is now estopped to set up his lien for work and labor performed, to the detriment of these bondholders. It is difficult to see how any such claim can be sustained.

It was the corporation, and not he, who gave the guaranty. If the bondholders have suffered any loss for which that instrument provides a remedy, the corporation is liable to suit for damages. Even then it must be proved that there has been a loss, and that the loss was suffered because the local subscriptions and grants were not sufficient to prepare the whole of said line for the rails. Before he can in any event be held liable, it must be shown that the construction company is liable and cannot respond to that liability.

Nothing of this kind is shown by the record. It might be otherwise if it were proved that he used this guaranty fraudulently and with false statements to negotiate the bonds; but this is not alleged or proven. We see no place for an estoppel in the case.

The other error alleged concerns the fact that the part of the road on which Hornby did his work, namely, the three miles between Pine Hill Cemetery and the city, is a separate division and not a part of the principal road, and that no lien as against these mortgagees can be established for that reason.

We have considered this question so fully in the case of *Brooks* v. *Railway Company* (*supra*, p. 443), that it is unnecessary to discuss it here. It is sufficient to say that, under the principle there laid down, that three miles is a part of the improvement, and the lien attaches to the whole of it. The fact that they consented that the court should limit it to the three miles can do appellants no harm.

Decree affirmed.

STEWART *v.* PLATT.

1. A mortgage of goods and chattels in the State of New York, which is not accompanied by an immediate delivery and followed by an actual and continued possession of them, is void as against the creditors of the mortgagors, subsequent purchasers, and mortgagees in good faith, if it be executed by a firm the members of which reside there, unless, pursuant to the statute, it be filed in the city or town where they respectively reside.
2. A failure so to file it does not impair its validity as between the mortgagee and the mortgagors, or the assignee in bankruptcy of the latter.
3. Where a controversy arose between the assignee in bankruptcy of the mortgagors, their execution creditors, and the mortgagee, touching the application of the fund in court derived from the sale of the personal property covered by a mortgage which was not so filed, — *Held*, that the creditors are entitled to payment, and that the residue of the fund, the same not being more than sufficient to satisfy the mortgage debt, belongs to the mortgagee, and is not chargeable with any expense incurred by the assignee in the execution of his trust.
4. Where property, conveyed to the wife under a valid settlement made by the husband, was by their joint act afterwards appropriated to the payment of one of his creditors, — *Held*, that subsequent creditors and his assignee in bankruptcy could not rightfully complain.
5. The bankrupt law does not prohibit an insolvent debtor from dealing with or exchanging his property before proceedings in bankruptcy are instituted against him, provided there be no purpose to defraud or delay his creditors, or to give a preference to any one, and the value of his estate is not thereby impaired.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree whereby the distribution of a fund in court was ordered, and certain conveyances of real estate declared to be void as in violation of the provisions of the bankrupt law.

The record presents the following facts, in addition to those stated in the opinion of the court: —

By an indenture executed April 30, 1867, Alexander T. Stewart leased to Simeon Leland, Warren Leland, and Charles Leland, copartners, the Metropolitan Hotel, in the city of New York, for the term of four years from that date, at an annual rent of $79,186, payable in equal monthly instalments. One of the conditions of the lease was that, simultaneously with its delivery, the rent reserved should be secured by the lessees

giving a first mortgage and lien upon their household furniture and chattels of every description then contained in, and used for the purposes of, the hotel; and also that they should every year during the term, and within thirty days prior to the thirtieth day of April therein, renew such mortgage, and execute an additional one, covering all property of the like kind used at its date in the hotel for hotel purposes, including that described in the first mortgage.

The lessees accordingly executed and delivered to Stewart a first mortgage upon the property described, dated April 30, 1867, which they acknowledged June 11. It was filed September 2 in that year in the office of the register of deeds for the city and county of New York. Among its stipulations was one that in case of default in the payment of rent, at the times and in the manner specified in the lease, the lessor might "take and carry away the said goods and chattels," dispose of them at the best price he could obtain, and apply the proceeds in satisfaction of the rent due and unpaid. As required by the lease, mortgages in renewal, and in addition containing similar conditions, were executed by the lessees during the subsequent years of the term, and filed in the same office.

At the respective dates of the several chattel mortgages, as well as during the entire term of the lease, Simeon Leland resided with his family at New Rochelle, in Westchester County, New York, where he had resided since 1850; Warren Leland resided with his family in the same county, and had resided there since 1857; and Charles Leland then and for the ten or twelve previous years resided with his family at Mt. Vernon, in the same county.

None of the mortgages were filed in the towns where the lessees resided with their families.

In pursuance of an arrangement made in January, 1871, between the lessees and Stewart, the former caused conveyances to be made to the latter as follows: 1st, Certain houses and lots on Crosby and Jersey Streets in New York City, at the price of $10,000, by conveyance from George S. Leland, dated Jan. 23, 1871, acknowledged and recorded in the proper office on the following day; 2d, Certain houses and lots on Prince Street, in the same city, at the price of $14,000, by conveyance

from George S. Leland, dated Feb. 9, acknowledged Feb. 13, and recorded Feb. 15, 1871; 3d, An improved farm in the town of Harrison, Westchester County, at the price of $19,500, by conveyance from Warren Leland and wife, dated Feb. 1, acknowledged Feb. 2, and recorded Feb. 24, 1871.

The real estate conveyed by George S. Leland was the property of the lessees or of some of them, the legal title having been transferred to him, as was claimed, for the convenience of the real owners when they should sell to others.

The farm conveyed by Warren Leland and wife was purchased by him in 1866, and in pursuance of his directions conveyed to her in 1868.

There were at the time of these transactions unsatisfied mortgages for large sums upon all the real estate. Stewart took it subject to them, but without assuming to pay the debts thereby secured.

During the months of February and March, 1871, numerous creditors obtained judgments against the lessees, in the courts of New York, and sued out executions, which were levied upon the property covered by the chattel mortgages. The judgments were also docketed in the proper offices in New York City and in Westchester County, so as to create a lien upon the real estate of the lessees. The first, in point of time, of these executions was issued February 3, and the last March 29, in that year.

Upon the petition of one of their creditors, filed March 24, 1871, the lessees were duly adjudged bankrupts April 1, 1871. Under an order of the bankrupt court, directing possession to be taken of their property, the marshal took into his custody that covered by the chattel mortgages to Stewart. It was inventoried at $47,253.92, and under subsequent orders of the court was sold at public auction, bringing the sum of $43,469.31. After paying sundry expenses there remained at the date of the decree in the District Court about $26,867.29, subject to distribution.

This suit was commenced in the District Court May 26, 1871, by the assignee in bankruptcy of Simeon, Warren, and Charles Leland, against them, their judgment creditors, Stewart, and others. The bill, besides seeking the distribution of

that fund, assails as invalid, not only the several chattel mortgages and the conveyances of the real estate heretofore described, but also the judgments obtained in February and March, 1871. The assignee claimed that he was entitled to the fund in court, and also to the proceeds of the sale of the real estate, for distribution among all the creditors of the bankrupts, without any preference among them, except one Ramaley, who was conceded to be entitled upon his judgment to priority.

The court, upon final hearing, held that the chattel mortgages as well as the conveyances of real estate were void as against the assignee in bankruptcy. Stewart was ordered to convey the real estate to the assignee, and he was adjudged to be liable for the net rents and profits arising from the same subsequently to the execution of the several conveyances. The court also held that the judgments obtained against the bankrupts within four months preceding the commencement of the bankruptcy proceedings were void as against the assignee, and by its further order prohibited Stewart and the judgment creditors from proving their claims in the bankrupt court.

An appeal was taken to the Circuit Court, pending which Stewart died. His representatives were made parties to the proceedings. The decree of the District Court as to the chattel mortgages and the conveyances of the real estate was affirmed, and reversed only as to the creditors who had obtained judgments against the lessees within four months prior to March 24, 1871. The court held that the several judgments had not been obtained in violation of the bankrupt law, and that the claim upon the fund in court, asserted by the creditors, whose executions had been levied prior to the commencement of the proceedings in bankruptcy, was superior to the respective claims of Stewart and the assignee.

From that decree this appeal is prosecuted by the devisee and the executors of Stewart.

The case was argued by *Mr. Roscoe Conkling* for the appellants, and by *Mr. A. H. Dana* and *Mr. Dennis McMahon* for the appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The objects of this suit, so far as they concern the appellants, were, —

1st, To obtain the distribution of the fund arising from the sale of furniture and other personal property in use in the Metropolitan Hotel, in the city of New York, at the commencement of the proceedings in bankruptcy. The Lelands were lessees of that hotel under a written lease from A. T. Stewart, dated April 30, 1867, for a term of four years thereafter, at an annual rent of $79,186, payable in equal monthly instalments. Upon the property thus sold Stewart held, as security for rent reserved by the lease, several chattel mortgages executed by the Lelands, the validity of which was questioned in this suit by the assignee in bankruptcy.

2d, To have a decree declaring sundry judgments against the bankrupts within four months prior to the adjudication in bankruptcy, as well as certain conveyances of real estate to Stewart, to be, as against the assignee, invalid under the provisions of the bankrupt law.

The first question to which we will direct our attention relates to those several chattel mortgages.

The District and Circuit Courts concurred in opinion that they were not filed in the office designated by the statutes of New York, and, upon that ground, were ineffectual to give the security and lien contemplated by the parties, and void as against the assignee.

By the laws of New York it is provided that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the act. The statute requires such mortgages to be filed in the town or city where the mortgagor, "if a resident of that State, shall *reside* at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument."

In the city of New York, the mortgage is directed to be filed in the office of the register of said city; in other cities of the State, and in the several towns thereof in which a county clerk's office is kept, in such office; and, in each of the other towns of the State, in the office of the town clerk thereof. Registers and clerks are required to file such instruments, presented to them for that purpose, and indorse thereon the time of receiving same, and keep them deposited in their offices for the inspection of the persons interested.

It is further provided that every mortgage filed in pursuance of the statute should cease to be valid against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage, a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him in virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then *reside*.

The bankrupts resided with their families in the county of Westchester at the respective dates of the several chattel mortgages, but the business of the firm of Simeon Leland & Co., as lessees of the Metropolitan Hotel, was carried on in the city of New York, and all the property covered by the mortgages was in use in that hotel. The mortgages were filed in the office of the register of deeds for the city and county of New York, and were not filed in the towns where the lessees respectively resided with their families. The contention of learned counsel for the appellants is that *the firm* was the mortgagor, that *its* residence or domicile was in the city of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word "reside" employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no

such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute upon its face furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors at the time respectively reside.

Some stress is laid upon the fact that in each of the mortgages the mortgagors are described as "of the city of New York." If that is to be regarded as a representation by them that their fixed abode was in that city, it is obvious that the statute designed for the protection of creditors, subsequent purchasers, and mortgagees in good faith cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties to the injury of those whose rights were intended to be protected. The recital of the residence in the mortgage "seems to be of no importance, and might for the matter of security be omitted altogether." Nelson, C. J., in *Chandler* v. *Bunn*, Hill & D. Supp. (N. Y.) 167.

A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages executed by a firm upon its property to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted. On the other hand, it is quite easy to suggest reasons

of a cogent character why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considerations to be addressed more properly to the legislature of New York, with whom rests the power to make such alterations as experience may suggest to be necessary. The statute expressly declares that a chattel mortgage not filed as required by its provisions is void as to creditors and subsequent purchasers and mortgagees in good faith; and the circuit justice well said that the statute had "imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not, whether convenient or difficult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed." Upon this branch of the case, therefore, we concur in opinion with the Circuit Court.

It follows, necessarily, from what has been said, that the Circuit Court rightly adjudged that creditors who obtained judgments and sued out executions against the Lelands, previous to the commencement of bankruptcy proceedings, had prior claims and liens upon the proceeds arising from the sale of the property covered by the chattel mortgages.

But the final decree in the Circuit Court is erroneous in directing the residue of the proceeds of the sale of the mortgage property, after satisfying execution creditors, "to be paid to the assignee (in bankruptcy) for the purposes of the trust," and in charging that balance with the payment of the fees due counsel of the assignee.

In *Yeatman* v. *Savings Institution* (95 U. S. 764), we held it to be an established rule that, "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Brown* v. *Heathcote*, 1 Atk. 160; *Mitchell* v.

Winslow, 2 Story, 630; *Gibson* v. *Warden*, 14 Wall. 244; *Cook* v. *Tullis*, 18 id. 332; *Donaldson, Assignee*, v. *Farwell*, 93 U. S. 631; *Jerome* v. *McCarter*, 94 id. 734. He takes the property in the same 'plight and condition' that the bankrupt held it. *Winsor* v. *McLellan*, 2 Story, 492."

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. *Lane* v. *Lutz*, 1 Keyes (N. Y.), 213; *Wescott* v. *Gunn*, 4 Duer (N. Y.), 107; *Smith* v. *Acker*, 23 Wend. (N. Y.) 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have effected it, had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the bankrupt law.

It results that the court below erred in directing the fees of the assignee's counsel to be paid out of the residue of the fund in court remaining after the claims of execution creditors were satisfied. To that balance the appellants are entitled without

diminution, to be applied in payment of the rent remaining unpaid, after crediting thereon $43,500, the agreed valuation of the real estate conveyed to Stewart, and to which we will presently refer in another connection. It was error to charge that balance with the payment of costs of fees of counsel, or any expense incurred by the assignee in bankruptcy in the administration of his trust.

We come now to the questions relating to the several conveyances of real estate made to Stewart in January and February, 1871; all of which were adjudged by the Circuit Court to be void as against the assignee in bankruptcy.

It is important to consider the circumstances under which those conveyances were made. Early in the month of January, 1871, commenced a series of interviews between the lessees and Stewart, brought about, perhaps, by the demand of the latter, through his agent, for the settlement of rent in arrear, which then amounted to about $50,000. The lessees desired a new lease at a reduced rent, while Stewart insisted upon the payment, or a satisfactory arrangement, of the rent due him. They confessed present inability to discharge the indebtedness in any other mode than by conveyances of real estate, which they urged him to take at fair valuation and give a new lease at reduced rent. They, in those interviews, expressed the utmost confidence that such an arrangement would relieve them from all immediate financial burdens, growing out of the hotel business, and enable them to meet promptly thereafter not only instalments of rent, but all other engagements. Stewart, finally, agreed, for the accommodation of his lessees, to accept certain real estate, offered to him at the aggregate price of $43,500, in satisfaction of a like amount of back rent, and, necessarily, in extinguishment to that extent of his mortgages upon the furniture and other property in the hotel building. He also signified his willingness to renew the lease to the same parties, at the reduced rent of $65,000. In pursuance of this arrangement the lessees, or some of them, caused conveyances to be made to Stewart of the real estate in question, consisting of a farm in Westchester County, and several houses and lots on Crosby, Jersey, and Prince Streets, in New York City.

We are all of opinion that the conveyance, dated Feb. 1, 1871, by Mrs. Warren Leland and her husband of the farm in Westchester County, was unassailable by the assignee upon any ground whatever. That property was a gift from the husband to the wife at a time when his right to make it cannot be disputed. As early as 1868 it was distinctly separated from the mass of his property, and the title made to her for her benefit. There is no proof that the conveyance was with any intention to defraud his then existing or future creditors. Of those whose interests the assignee in bankruptcy here represents, or assumes to represent, none, except perhaps one, were creditors of Warren Leland at the date of that conveyance. The bill alleges that the bankrupts, or some of them, intended to give Stewart a preference over other creditors, and to that end, it is charged, Warren Leland caused the conveyance to be made to his wife of the farm in question, "owned by the said Warren Leland, but standing in the name of his wife." But clearly it was not owned by the husband after the execution of the absolute conveyance of 1868. Her rights, by reason of any thing appearing in this record, could not be disturbed by the husband's creditors who became such after the execution of the conveyance to her. She chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to Stewart, thereby surrendering her estate for the benefit of the husband's creditor. Suppose she had not so done, and that the title had remained in her name up to the time of the adjudication in bankruptcy. Would it be contended, for a moment, that the assignee in bankruptcy, or that the creditors of the bankrupts, becoming such after the execution of the conveyance, could have subjected that farm to the debts of Warren Leland against the consent of his wife? This question must, in view of the evidence, receive a negative answer, which shows, conclusively, that the appropriation of the wife's property, by the joint act of herself and husband, to the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy, or any subsequent creditor of the husband, can rightfully complain. The decree of the Circuit Court declaring the conveyance of that farm to Stewart to be void, and

requiring Mrs. Stewart to convey to the assignee in bankruptcy, was, for the reasons stated, clearly erroneous.

It remains to consider that part of the decree which declared the conveyances to Stewart of the houses and lots on Crosby, Jersey, and Prince Streets, in New York City, to be void.

When these conveyances were agreed to be made, Stewart, as already stated, had an undisputed claim for rent in arrear amounting to over $50,000. Under the provisions of the mortgages, a default in the payment of rent having taken place, Stewart, at the time the exchange was determined upon, could have taken actual possession of the mortgaged property and sold it for the best price he could obtain in satisfaction of his claim for rent. His right to possession for such a purpose could not have been questioned by any creditor of the lessees who had not, by previous judgment and execution, acquired a lien upon the mortgage property. *Burdick* v. *McVanner*, 2 Den. (N. Y.) 170; *Stewart* v. *Slates*, 6 Duer (N. Y.), 83; *Hall* v. *Sampson*, 35 N. Y. 274; *Ackley* v. *Finch*, 7 Cow. (N. Y.) 290; *Langdon* v. *Buel*, 9 Wend. (N. Y.) 80; *Patchin* v. *Pierce*, 12 id. 61. Instead of exercising that right, — a course which would have seriously endangered, if it had not utterly destroyed, the business and credit of the lessees, — Stewart, at their earnest solicitation, and for their accommodation, accepted real estate at a fair valuation in satisfaction of rent due and unpaid, thereby surrendering and extinguishing his lien to that extent upon the property described in the chattel mortgages. Of the $43,500 at which the real estate received by Stewart was valued, $19,500 represented the farm in Westchester County, which, we have shown, could not have been subjected to the claim of any creditors who became such after the conveyance to Mrs. Leland. In point of fact, therefore, only $24,000 in value of real estate, belonging to the bankrupts, was received by Stewart, while he surrendered his claim and lien for rent to the extent of $43,500. This was, in its substance and effect, a mere exchange of securities, not forbidden by the letter or the spirit of the bankrupt law. In *Cook* v. *Tullis* (18 Wall. 332), we said that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or

object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound in the misfortune of his insolvency to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." Substantially the same doctrine was announced in *Clark* v. *Iselin*, 21 Wall. 360; *Sawyer* v. *Turpin*, 91 U. S. 114.

These principles would seem to be decisive of the case under consideration. While there is some conflict in the testimony as to certain matters, we have a strong conviction, from all the facts and circumstances established by the proof, that the transaction by which the real estate, at a fair valuation, was substituted for the lien, of like amount, upon personal property, was without any fraudulent purpose. The substitution was not made to give a preference to Stewart. The belief and hope of the bankrupts, expressed in decided terms to him, were that the substitution or exchange would enable them to remove all financial obstacles of a serious nature. They induced him, by earnest representations, to share these hopes. He delayed or forebore to exercise the right, which, at the commencement of negotiations, he undoubtedly had, of taking the mortgaged property into his custody, and disposing of it in satisfaction of his claim for rent. That the arrangement in question did not substantially impair the value of the bankrupts' estate is abundantly clear. His lien, which was extinguished by the exchange, exceeded, in value, that portion of the real estate, embraced in the conveyances to him, which the creditors of the bankrupts could have reached under their executions. The fact that the mortgaged property brought only $43,469.31, is relied upon to show that the exchange did impair the estate of the bankrupts. This argument proceeds upon the assumption either that when the exchange was determined upon, he had not a lien upon the mortgaged property, as

between him and the mortgagors, or that if he had, he would not have enforced it by taking the property into his custody, upon a refusal of the lessees to make some satisfactory arrangement. But such assumption is without support in the law or the proof. Besides, the evidence leads to the conclusion that the mortgaged property sold, at public auction, for less than its fair value. While the witness, who made the inventory and appraisement, testifies that it sold for its full value, the auctioneer, who conducted the sale, testified that with proper appliances it would have brought fifty per cent more. It is certain that it sold for much less than either the lessees or Stewart at the time of their negotiations supposed it to be worth.

For these reasons we are of opinion that the court below erred in adjudging the conveyances to Stewart of the houses and lots on Crosby, Jersey, and Prince Streets, in New York, to be void, requiring Mrs. Stewart to convey the same to the assignee in bankruptcy, and declaring his estate liable for the rents and profits of the same.

Decree reversed, with directions to enter a decree in conformity with this opinion.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE BRADLEY, delivered the following opinion: —

I concur in the decree of reversal in this case, but I go further than the majority of the court. I think that the chattel mortgages were properly filed with the register in the city of New York. The mortgagors were partners doing business there. They are described in the mortgages as of that city. The property mortgaged was furniture in a hotel situated there, and it is to the records of the city that one would naturally resort to ascertain whether there were any liens upon it. The domicile of a firm, under the law requiring chattel mortgages to be filed in the county where the mortgagors reside, is, in my judgment, the place where it is located and carries on its business. I am of opinion, therefore, that the chattel mortgages in this case held the property against the judgments of the creditors.

GODDARD v. ORDWAY.

The Supreme Court of the District of Columbia affirmed a decree and allowed an appeal therefrom which was not perfected. A motion, whereof the adverse party had due notice, was thereupon made and entered on the minutes to vacate the affirmance and grant a reargument. Not having been acted upon, it was, by the general course and practice of the court, continued as unfinished business. *Held*, 1. That the motion prolonged the suit, and the parties thereto were in court until it should be finally disposed of. 2. That under such circumstances it was competent for the court at the ensuing term to grant the motion, vacate the allowance of an appeal to this court, and pass a decree of reversal.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Walter D. Davidge and *Mr. A. S. Worthington* for the appellant.

Mr. Richard D. Merrick and *Mr. Martin F. Morris* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This appeal presents the following case: —

During the summer of 1871, Albert Ordway, the appellee, was engaged in securing a contract with the government to furnish and cut the granite for the then proposed new building to be erected in Washington for the use of the State, War, and Navy Departments. His bid for the work was put in on the nineteenth day of June, and formally accepted about the 1st of August. He resided at Richmond, Va., and late in July, 1871, negotiated with Robert G. Shedd, now deceased, for a loan, not exceeding $50,000, to be used in preparations for the execution of the contract. As security, Shedd was to be given, in some appropriate way, a lien on the contract, and he was to be repaid in instalments out of the profits. Under this arrangement, loans were made at various times during the summer and fall of that year, amounting, in the aggregate, to $38,500, from moneys which Shedd had in his hands as trustee for others.

By the terms of the bid of Ordway, as accepted by the supervising architect, Ordway was to furnish the granite from

either the James River or the Green and Westham quarries near Richmond, as the architect should direct. He was to be paid certain stipulated prices for the stone as measured before cutting, when delivered at the site of the building. He was also to furnish the labor, tools, and materials necessary to cut, dress, and box the granite at the quarry in such manner as should be required, and also shops and sheds sufficient to accommodate one hundred granite-cutters, with a proper proportion of other mechanics. For this he was to be paid "the full cost of the . . . labor, tools, shops, sheds, and materials, and also the insurance on the granite, increased by fifteen per centum of the cost." At the time the bid was made and accepted, the erection of only that part of the building intended for the use of the State Department, being the south front, had been authorized, but Ordway was to furnish and cut, on the same terms and at the same prices, the granite for the whole building, as its construction should be provided for.

Ordway had control of the James River quarry, but not of the Green and Westham. The supervising architect required that the granite should be taken from the Green and Westham, which was owned by Andrews & Green. This made it necessary for Ordway to arrange, in some way, with Andrews & Green for the use of their quarry. The result was, that on the 7th of August these three persons entered into a copartnership under the name of Andrews, Ordway, & Green, and Andrews and Green put into the business their quarry, on certain specified terms, and Ordway all his contract with the government except that part which related to the cutting, boxing, &c., for the south front, which, as between himself and the firm, he retained for his own use. The profits accruing to the firm from the execution of the contract were to be divided in the proportion of fourteen thirty-sixths to Ordway and eleven thirty-sixths to each of the other partners. All other profits and losses were to be shared equally.

On the 16th of November, 1871, the contract between Ordway and the government was executed in form by Ordway and the supervising architect. On the 25th of November, Ordway entered into what was called an agreement of copartnership with one Andrew Washburne, "for the purpose of cutting,

dressing, and boxing the stone to be furnished the United States under the contract of Ordway, dated Nov. 16, 1871, for the new State Department," but which was in reality a transfer of that part of the contract from Ordway to Washburne. By the terms of the arrangement Washburne was to furnish all the capital, do all the work, and get all the pay. The transfer, however, was expressly confined to work for the State Department proper; that is to say, the south front of the building. This arrangement was assented to and recognized by the Secretary of State on the 12th of December.

Work was begun under the contract of Ordway in January, that being as soon as the necessary plans were furnished. From the beginning Washburne received the moneys realized from the cutting and boxing part of the contract. This yielded a large profit, but the price paid for the granite in the rough was less than the cost of quarrying and delivery, and entailed a loss on Andrews, Ordway, & Green. The supervising architect required that the cutting should be done near the place of shipment on the river. This increased somewhat the expenses for transportation, and deprived the firm of some incidental advantages anticipated from having the work done at the quarry. For this reason Washburne, in March, or about that time, gave up to the firm six-fifteenths of the fifteen per cent paid him in addition to the cost of cutting, &c., but retained the rest until he afterwards, during the latter part of the spring or in the summer, transferred all his remaining interest in the contract to Andrews, one of the firm of Andrews, Ordway, & Green. For this he was paid a consideration by Andrews individually. The entire amount paid Washburne and Andrews on account of the percentage on the cost of cutting for the south front was about $94,000, and it nowhere appears that Ordway derived any advantage from this part of his contract with the government except indirectly through the six per cent given up to the firm of Andrews, Ordway, & Green. The cutting for the south front was all finished in March, 1874, and the profits realized and paid over. The last payment on this account was made in February or March of that year.

On the 29th of May, 1872, Ordway entered into a written agreement with Shedd, by which, after reciting his contract

with the United States for furnishing and cutting the granite for the State, War, and Navy Department building, and that he was then "filling said contract as rapidly as he can under government supervision, said contract being filled and performed with others, and especially with the firm of Andrews, Ordway, & Green, of which he is a member," he conveyed to Shedd "three-eighths of the profits that accrue to the said Ordway, either individually or as a partner in the firm of Andrews, Ordway, & Green." He also in the same agreement declared it to be his intention thereby, "from the income and profits of said government contract, to amply, fully, and finally secure said Shedd, as said trustee, from any and all loss by reason of his said loan of $38,500." Full provision was made for an examination of accounts by Shedd and for payments by Ordway from time to time out of the profits as they accrued to him from the contract as it was fulfilled.

During the commercial crisis of 1873, the firm of Andrews, Ordway, & Green became financially embarrassed, and borrowed a large amount of money from J. Condit Smith. At his suggestion, the Westham Granite Company was incorporated, in March, 1874, and all the property of the firm, including the government contract, transferred to that company. Stock in the company was given to him for his debt, and to the firm for the estimated value of its property over what was owing him. The stock issued to the firm was held for the payment of outstanding debts, and then for distribution among the partners in proportion to their respective interests. The amount to which Ordway was entitled has never yet been ascertained. According to the evidence, that matter is still in the hands of a referee, mutually chosen by the parties, for adjustment.

On the 26th of July, 1874, Ordway was directed by the supervising architect to furnish and cut under his contract the granite required for the east wing of the building, an appropriation having been made by Congress for that purpose on the 23d of June previous. The Granite Company, as the successor of Andrews, Ordway, & Green, immediately entered on the performance of this work.

On the 4th of January, 1875, Shedd, then in life, not having been paid any thing by Ordway, commenced this suit for an

account of the profits that had already been realized by Ordway from the contract, and for the appointment of a receiver to collect such moneys as should thereafter belong to him, Shedd, under his agreement. Upon the filing of the bill, Ordway was enjoined from making any further collections from the department. Various modifications of this injunction were made from time to time, and on the 7th of July, 1875, Ordway was permitted to collect all but three-eighths of the fifteen per cent on the expenditures for labor, &c., under the cutting part of the contract, and a receiver was appointed to collect and hold this three-eighths to await the result of the suit.

After answer and replication, proof was taken which established the foregoing facts. On the 24th of November, 1875, a decree was entered at a special term declaring the right of Shedd to the moneys then in the hands of the receiver, and to three-eighths of the fifteen per cent payable in the future progress of the work under the part of the contract which related to the cutting, until his debt was fully paid. The receiver was continued for the purpose of making future collections as the money from time to time fell due. From this decree an appeal was taken to the general term. On the 18th of December, 1876, the death of Shedd was suggested on the record, and Goddard, the appellant, his administrator, made complainant in his stead. On the same day a decree was entered affirming that made at the special term. Included in the same entry was an order of the court allowing an appeal to this court on the prayer of Ordway. No bond was ever executed, and nothing further was done under this allowance. On the 22d of December, and during the term, a notice was served on Goddard by Ordway to the effect that he would "move that the order affirming the decree . . . be set aside, and the case reargued, on the ground that a motion for reargument heretofore made in open court had never been brought up in consultation, or determined by the court, at the time of making said order of affirmance, and that said order of affirmance ought not to have been made in the premises, but was irregularly and inconsiderately pronounced and entered." On the 30th of December an entry was made on the minutes of the court, to the effect that the appeal which had been allowed was withdrawn by Ordway.

On the same day the following entry appears on the journal of the court: —

"And now comes the defendant, and by his counsel, R. T. Merrick, moves the court to vacate the judgment of affirmance heretofore made in the above-entitled cause, and for leave to argue the same before a full bench; and assigns as reason therefor, in addition to reasons heretofore filed, that said cause was heard before only three of the justices, and that the judgment was rendered by only two of the justices, with whom the third did not concur."

After this entry was made, and before the motion was heard or disposed of, the court adjourned for the term. On the 6th of January, 1877, which was at the next term of the court, it was ordered that the cause be reargued and placed on the calendar of that term. Goddard afterwards moved to vacate this order, because at the time it was made the court had no jurisdiction of the suit or of the parties; and also because the rules of court were not complied with in respect to the form of the motion and the time of filing. On the 19th of February this motion was overruled, and on the 28th of March, the cause having been reargued, the decree of the special term was reversed, the bill dismissed, and an order made on the receiver to pay over the moneys in his hands, $24,931.72, to the defendant, Ordway, after deducting the receiver's commissions. From that decree Goddard, as administrator, appealed.

The first question presented for our consideration on the argument was as to the jurisdiction of the court below at its general term in March, 1877, to set aside the order of affirmance made at the previous term, and give a new decree dismissing the bill, the motion to vacate the order and for leave to reargue the cause not having been filed until after the affirmance had actually been entered and after an appeal to this court allowed. The objections urged to the jurisdiction were: 1, that a court cannot reverse or annul its final decrees or judgments for errors of fact or law after the term at which they were rendered; 2, that the motion was not either in form or substance such as is required by equity rule 88 of that court for a petition for rehearing; and, 3, that the appeal to this court allowed by the court below on the 18th of December, 1876,

took from that court the power to proceed further with the cause, or to entertain a motion to vacate the decree appealed from.

So far as the first objection is concerned, it is sufficient to say that the motion to vacate the order of affirmance and grant a reargument was made to and recognized by the court at the same term the order was entered, and before a final adjournment. This is evident from the fact that the motion was entered on the minutes of the doings of the court for the term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment, but when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way. In the Supreme Court of the District, as we are advised, if any matter in hand is not disposed of at one term, it is deemed to have been continued to the next. Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance. In this case the motion to allow a reargument went over as unfinished business, and carried the parties with it. The proceeding was in all material respects like a motion for a new trial filed in time at one term and not disposed of until the next. Under such circumstances, a judgment or decree, although entered in form, does not discharge the parties from their attendance in the cause. They must remain until all questions as to the finality of what has been done are settled. The motion, when entertained, prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding.

The second objection is, as we think, equally untenable. The motion, as made, was nothing more than an application to the court to vacate a decree which had been entered at a former day in the term, improvidently and without sufficient consideration. It was addressed entirely to the discretion of the court, and depended on facts within the knowledge of the justices. It was in no just sense a petition for rehearing, and even if it had been, we should not be inclined to reverse a decree because of what was, under the circumstances, an immaterial departure

from technical rules. *Allis* v. *Insurance Company*, 97 U. S. 144. The grounds of the application were sufficiently stated, and a verification under oath might well have been omitted, since the records of the court showed every thing that was claimed. In reality, the whole matter resolved itself into the simple question of who should appeal to this court. Ordway would have appealed if the original decree had stood, and Goddard has done so since it was set aside.

The allowance of the appeal to Ordway was a judicial act of the court in term time. The order was entered on the minutes as part of what was done in the cause by the court while in session. In *Ex parte Lange* (18 Wall. 163), we said that "the general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable." *Bassett* v. *United States*, 9 Wall. 38; *Doss* v. *Tyack*, 14 How. 297. As part of the "roll of that term," they are deemed to be "in the breast of the court during the whole term." Bac. Abr., tit. Amendment and Jeofail, A. Under this rule, we think it clear that the court had the power during the term, at the request of Ordway, to set aside the order of allowance and thus vacate the appeal which had been granted in his favor. This was done before any adverse rights had intervened. We are unable to see how the allowance of an appeal differs in this respect from any other judicial order made in the cause. If the one is subject to revocation or amendment while the term continues, so, as it seems to us, must be the other.

There is nothing in this which interferes with the rule that where an appeal is allowed all jurisdiction of the suit appealed is transferred to this court. Here the question is whether an appeal was in legal effect allowed. It is true an order of allowance was granted and entered on the minutes of the court. So long as this order continued in operation, it bound the parties; but as it remained subject to the judicial power of the court during the term at which it was entered, its revocation vacated what had been done, and left the decree standing with no appeal allowed. *Ex parte Roberts*, 15 Wall. 384. Neither one of the parties was finally discharged from the court until the term ended, and each was bound to take notice of whatever was done

affecting his interests in the suit until a final adjournment actually took place.

Under these circumstances, we think the case is now here on its merits. The last decree at the general term was the final decree in the cause, and the appeal which has been taken from that decree opens the whole case for our consideration.

Upon the merits the decree below was right. Whatever may have been the original understanding with Shedd as to the security he was to have, it is clear that in the end he got only three-eighths of the profits that accrued to Ordway from his government contract, either individually or as a partner in the firm of Andrews, Ordway, & Green. All previous arrangements were merged in that finally reduced to writing. If the fund in court, therefore, does not in legal effect belong to Ordway, that is to say, does not represent his share of the profits growing out of the contract, it cannot be given to the representative of Shedd.

The testimony shows conclusively that down to the time the decree below was rendered, neither Andrews, Ordway, & Green, nor the Westham Granite Company, had realized any profits that were properly divisible to Ordway. Confessedly, the partnership had made nothing, and was largely in debt when the Granite Company was formed and took an assignment of the contract from the firm. If the company had in fact made any thing, the individual partners in the old firm had not, because the outstanding debts of the firm were to be paid before they could claim any distribution among themselves. The dividends on the stock held for the firm were liable to the payment of the debts before the partners individually were entitled to any thing.

All the profits on the cutting for the south front went to Washburne and his assignee, and never belonged to Ordway. Upon this question the evidence leaves no doubt. But whether that be so or not, nothing growing out of that part of the contract ever came into the hands of the receiver. That work was completed and the profits all received and paid over nearly a year before this suit was commenced.

As Ordway reserved from his transfer to Andrews, Ordway, & Green only that part of the contract for cutting which had

reference to the south front, it follows that the cutting for the east wing passed with the rest of the contract to the firm and its successor, the Granite Company. The percentage payable on that part of the work all belonged to that company, and neither Ordway nor Shedd's representative could claim any part of it individually until it was due to Ordway as profits to be divided. The money collected by the receiver was three-eighths of this percentage. As the contract for the work stood in the name of Ordway at the department, he alone was recognized by the government when payments were made; but in making the collections he acted as the agent of the Granite Company, and was bound to pay over at once to the proper representative of the company every thing that came into his hands in this way. The receiver's title is no better than his would have been if the money had got into his hands. It follows that upon the case as it stands no decree can be rendered in favor of the present complainant for the money now in court.

Although Ordway is the only defendant in the suit, the controversy is about the fund in court. As he was the agent of the Granite Company authorized to make the collections from the government, he may defend the title of his principal. The suit is in effect the same as it would be if the money were now in his hands, and the representative of Shedd was seeking to prevent his paying it over to the company. In such a case it is clear he could show that he was but a trustee, and so, we think, he can in this. If, when our mandate goes down, the court below shall deem it necessary, in order to insure the payment of the money in the hands of the receiver to the Granite Company or its proper representative, that some special order be made in that behalf, that court is hereby authorized to take such action therein as shall seem to be necessary. It is clear from the evidence that the fund does not belong to Ordway, and that its payment to the Granite Company or its successors or assigns should in some form be secured.

Decree affirmed.

WOLSEY v. CHAPMAN.

1. It has been settled in this court that the title of the Des Moines Navigation and Railroad Company to the lands donated to the State of Iowa for the improvement of the Des Moines River by the act of Aug. 8, 1846 (9 Stat. 77), is good against the State, the railroad companies claiming under the act of May 15, 1856 (11 id. 9), and, after 1855, as against pre-emptors under the act of Sept. 4, 1841. 5 id. 453.
2. The order of the Secretary of the Interior of April 6, 1850, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was, in contemplation of law, the order of the President, and had the same effect as a proclamation mentioned in said act of 1841. Being so reserved, they were not subject to selection by the State of Iowa, as forming a part of the five hundred thousand acres granted to her for internal improvements, which she, with the consent of Congress, appropriated to the use of common schools.
3. The title which the State acquired to the lands above said Raccoon Fork by the joint resolution of March 2, 1861 (12 Stat. 251), and the act of July 12, 1862 (id. 543), inured to *bona fide* purchasers from the State under the grant of Aug. 8, 1846, and not to parties whose right is derived from her claim to them for school purposes.
4. Those acts give the State and such *bona fide* purchasers the same assurance of title as if the act of 1846 had granted all that succeeding legislation secured for the river improvement.
5. The adjustment made in 1866 by the Department of the Interior and a commissioner acting under the authority of the State of Iowa, and ratified by the act of Congress, approved March 3, 1871 (16 Stat. 582), settled the rights of no parties other than the State and the United States.
6. The contract entered into June 9, 1854, between the State and the Des Moines Navigation and Railroad Company, contemplated a conveyance of all the river-grant lands not sold by the State on Dec. 23, 1853. By a joint resolution passed March 22, 1858, the State agreed to convey to the company all the lands contained in said grant except such as she had sold prior to Dec. 23, 1853. *Held*, that the land in controversy having been certified as part of the lands granted to Iowa for the improvement of the Des Moines River, the governor of the State was authorized to convey it to said company.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Galusha Parsons* for the appellants, and by *Mr. George G. Wright* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case presents again for consideration the Des Moines River improvement grant, 9 Stat. 77. It is a suit in equity brought by Chapman, who claims under the river grant, to quiet his title as against Wolsey, whose rights depend on a patent from the State of Iowa granting the lands in dispute as part of lands ceded to the State under the eighth section of the act of Congress passed Sept. 4, 1841, entitled "An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights." 5 id. 453. That section is as follows: —

"SECT. 8. And be it further enacted, that there shall be granted to each State specified in the first section of this act five hundred thousand acres of land for purposes of internal improvement: *Provided*, that to each of the said States which has already received grants for said purposes there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres, the selections in all of the said States to be made within their limits respectively in such manner as the legislature thereof shall direct; and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States in said States respectively shall have been surveyed according to existing laws. And there shall be, and hereby is, granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Sect. 10 granted pre-emption rights in the public lands, but provided that "no lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands

reserved for the support of schools, nor the lands acquired by either of the two last treaties with the Miami tribe of Indians in the State of Indiana, or which may be acquired of the Wyandot tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act; no sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement; no sections or fractions of sections included within the limits of any incorporated town; no portions of the public lands which have been selected as the site for a city or town; no parcel or lot of land actually settled and occupied for the purposes of trade and not agriculture; and no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

At that time Iowa was a Territory, organized under the act of June 12, 1838. Id. 235. On the 8th of August, 1846, Congress passed the act making the Des Moines River grant (9 Stat. 77), the material parts of which are as follows: —

"An Act granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines River, in said Territory.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork (so-called) in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated), in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

"SEC. 2. And be it further enacted, that the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall progress; that is, the said Territory or State may sell so much of said lands as shall produce the sum of $30,000, and then the sales shall cease until the governor of said

Territory or State shall certify the fact to the President of the United States that one-half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended; and thus the sale shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

"SEC. 4. And be it further enacted, that whenever the Territory of Iowa shall be admitted into the Union as a State, the lands hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act, and no other, provided the legislature of the State of Iowa shall accept the said grant for the said purpose."

On the 28th of December, 1846, Iowa was admitted into the Union as a State. 9 id. 117. By the Constitution, under which the admission was granted, the 500,000 acres of land to which the State became entitled by the act of 1841 were appropriated to the use of common schools (Const. Iowa, 1846, art. 9; School Fund and Schools, sect. 3), and on the 2d of March, 1849, Congress, by a special act, assented to this appropriation. Id. 349.

On the 17th of October, 1846, the Commissioner of the General Land-Office requested the governor of the Territory to appoint an agent to select the land under the river grant, at the same time intimating that the grant only extended from the Missouri line to the Raccoon Fork of the Des Moines River. On the 17th of December, a few days before the admission of the State, the territorial authorities designated the odd-numbered sections as the lands selected under the grant. The State accepted the grant in form by joint resolution of the General Assembly approved Jan. 9, 1847. On the 24th of February following, the State created a "Board of Public Works," to whom were committed the work, construction, and management of the river improvement, and the care, control, sale, disposal, and management of the lands granted the State by the act of 1846. This board was organized Sept. 22, 1847, and on the 17th of February, 1848, the Commissioner of the General Land-Office, in an official communication to the secretary of the board, gave it as the opinion of his office that

the grant extended throughout the whole length of the river within the limits of the State. On the 19th of June, 1848, without any notice of a revocation of this opinion, a proclamation was issued by the President, putting in market some of the lands above the Raccoon Fork the title to which would pass to the State if the Commissioner was right in the construction he gave the grant. This led to a correspondence on the subject between the proper officers of the State and the United States, which resulted in the promulgation of an official opinion by the Secretary of the Treasury, bearing date March 2, 1849, to the effect that the grant extended from the Missouri line to the source of the river. In consequence of this opinion, the Commissioner of the General Land-Office, on the 1st of the following June, directed the registers and receivers of the local land-offices to withhold from sale all the odd-numbered sections within five miles on each side of the river above the Raccoon Fork.

Afterwards, the State authorities called on the Commissioner of the General Land-Office for a list of lands above the Raccoon Fork which would fall to the State under this ruling. The list was accordingly made out, and on the 14th of January, 1850, submitted to the Secretary of the Interior for approval; jurisdiction of matters of that kind having before that date been transferred by law from the Treasury to the Interior Department. On the 6th of April, the Secretary returned the list to the land-office with a letter declining to recognize the grant as extending above the Raccoon Fork without the aid of an explanatory act of Congress, but advised that any immediate steps for bringing the lands into market be postponed, in order that Congress might have an opportunity of acting on the matter if it saw fit.

On the 20th of July, 1850, the agent of the State having in charge the school lands and school fund gave notice at the General Land-Office that he had selected the particular piece of land in controversy in this suit as part of the 500,000-acre grant under the act of 1841. Other lands coming within the river grant, if extended above the Raccoon Fork, amounting in the aggregate with this piece to $12,813\frac{61}{100}$ acres, were included in a list of similar selections approved at the Land Department

in Washington on the 20th of February, 1851. Two days afterwards, February 22, the Board of Public Works of the State formally demanded of the Secretary of the Interior for the river grant all the alternate odd sections above the fork. On the 26th of July the order of the Secretary of the Interior, under date of April 6, 1850, withholding the disputed lands from sale, was continued in force until the end of the approaching session of Congress, in order to give the State an opportunity of petitioning for an extension of the grant.

On the 29th of October, 1851, the Secretary of the Interior, after consultation with the President and his Cabinet, and pursuant to a decision there made, wrote the Commissioner of the General Land-Office as follows: —

"SIR, — I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month.

"I have reconsidered and carefully reviewed my decision of the 26th July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my approval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Fork, as far as the surveys have progressed, or may hereafter be completed and returned."

The lists were submitted accordingly, and the following indorsement was made thereon by the Secretary: —

"The selections embraced in the within list (No. 8) are hereby approved in accordance with the views expressed in my letter of

the 29th instant to the Commissioner of the General Land-Office, subject to any rights which may have existed at the time the selections were made known to the land-office by the agents of the State, it being expressly understood that this approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt by the local land-officers of the letter of the Commissioner of the General Land-Office, communicating the decision of Mr. Secretary Walker, to the effect that the grant extended above the Raccoon Fork."

No. 3 showed the vacant lands above the Raccoon Fork subject to the claim of the State, and included the particular parcel involved in this suit. On the 16th of March, 1852, the list was forwarded to the several local land-offices as showing the land which fell to the State under the construction given the river grant by the Secretary of the Treasury, March 2, 1849, and by the Secretary of the Interior, Oct. 29, 1851.

On the 20th of August, 1853, the school-fund commissioner of Webster County, under the authority of an act of the General Assembly of the State of the 25th of February, 1847, entitled "An Act to provide for the management and disposition of the school fund," contracted to sell to William T. Wolsey the land about which this suit arose. The purchase-money having been paid in full, the governor of the State, on the 20th of December, 1854, issued to Wolsey a patent in the form required to pass title under such a sale. This patent purported on its face to have been granted as and for a conveyance of school lands.

On the 6th of January, 1854, after the contract of sale to Wolsey, but before the issue of the patent, the Commissioner of the General Land-Office formally withdrew the approval by the Land Department of the selection of lands as part of the 500,000-acre grant which fell within the river grant, according to the opinion of the Secretary of the Treasury, March 2, 1849, and the Secretary of the Interior, Oct. 29, 1851. On the 30th of December, 1853, the Secretary of the Interior approved to the State, "under the act of Aug. 8, 1846, without prejudice to the rights, if any there be, of other parties," a list of the $12{,}813\frac{61}{100}$ acres erroneously approved, 20th February, 1851, as lands selected under the act of 1841, "previous to the adjust-

ment of the grant, and before it was known that they belonged to the State under the Des Moines River grant."

Until the 17th of December, 1853, the State itself, through its board of public works, carried on the work of improving the river, paying the expense from the proceeds of the sales of the lands included in the river grant. A land-office had also been established for the sale of these lands. On that day the State entered into a contract with one Henry O'Reilly to complete the work. This contract O'Reilly transferred, with the consent of the State, to the Des Moines Navigation and Railroad Company, a New York corporation, and on the 9th of June, 1854, in consequence of this transfer, a new contract was entered into between the State and the corporation for the purpose of simplifying and more fully explaining the original contracts and agreements. By the new contract the State agreed to convey to the company "all of the lands donated to the State of Iowa for the improvement of the Des Moines River by act of Congress of Aug. 8, 1846, which the said party of the second part" (the State) "had not sold up to the twenty-third day of December, 1853." This was the date at which it was supposed the sale of the lands could be stopped at the State land-office after the contract with O'Reilly.

On the 15th of May, 1856, Congress passed an act (11 Stat. 9) granting to the State of Iowa, to aid in the construction of certain railroads, every alternate section of land designated by odd numbers for six sections in width on each side of each of the several roads. The granting clause of the act contained, however, the following proviso: —

"*And provided further*, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

In 1856, the Commissioner of the General Land-Office decided not to certify any more lands to the State under the

river grant, and thereupon the Navigation Company suspended work on the improvement. This led to a settlement between the State and the company, under the authority of a joint resolution of the General Assembly for that purpose, passed March 22, 1858, by which the State agreed to convey to the Navigation Company all the lands contained in the river grant which had been approved and certified to the State by the general government, "excepting all lands sold or conveyed, or agreed to be sold or conveyed by the State of Iowa, by its officers and agents, prior to the twenty-third day of December, 1853, under said grant." Afterwards, May 3, 1858, the governor of the State executed to the company a deed conveying the lands now in controversy, with others, by a specific description of sections, townships, and ranges; and on the 18th of the same month he executed another deed, which purported on its face to have been made pursuant to the joint resolution of the General Assembly authorizing the settlement with the company, and described the lands in the exact language of general description used in the resolution.

Chapman, the plaintiff below, has all the title to the lands involved in this suit which passed in this way to the Navigation Company.

At the December Term, 1859, and during the month of April, 1860, this court decided, in *The Dubuque & Pacific Railroad Company* v. *Litchfield* (23 How. 66), that the river grant as originally made did not extend above the Raccoon Fork, and thereupon, on the 18th of May, 1860, the Commissioner of the General Land-Office sent to the registers and receivers of the local land-offices a notice to be promulgated, as follows: —

"Notice is hereby given that the lands along the Des Moines River, in Iowa, and within the claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Fork of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved for the time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

"This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual, *bona fide*

settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper."

On the 2d of March, 1861 (12 Stat. 251), Congress passed the following joint resolution: —

"*Joint Resolution to quiet title to lands in the State of Iowa.*

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that all the title which the United States still retain in the tracts of land along the Des Moines River, and above the mouth of the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress, approved Aug. 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be and the same is hereby relinquished to the State of Iowa."

And on the 12th of July, 1862 (id. 543), the following act was passed: —

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the grant of lands to the then Territory of Iowa, for the improvement of the Des Moines River, made by the act of Aug. 8, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said State; such lands are to be held and applied in accordance with provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines, & Minnesota Railroad, in accordance with the provisions of the act of the General Assembly of the State of Iowa, approved March 22, 1858; and if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa, under the joint resolution of March 2, 1862, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State to be certified in lieu thereof: *Provided*, that if the said State shall have sold and conveyed any portion of the lands lying within the limits of this grant, the title of which has proved invalid, any lands which shall

be certified to said State in lieu thereof, by virtue of the provisions of this act, shall inure to and be held as a trust fund for the benefit of the person or persons respectively whose titles shall have failed as aforesaid."

After the passage of the joint resolution of March 2, 1861, the Commissioner of the General Land-Office called on the governor of the State for a list of the tracts of land "held by *bona fide* purchasers of the State of Iowa" on that date. In response to this request the governor and land commissioner of the State, on the 20th of November, 1862, furnished the list required, and among others included the tracts granted to the Navigation Company on the settlement made with that company under the joint resolution of March 22, 1858. This list was filed in the General Land-Office Dec. 1, 1862.

On the 30th of March, 1866, an act was passed by the General Assembly of Iowa providing for the adjustment of certain land claims with the general government. By this act Josiah A. Harvey, the register of the State land-office, was appointed a commissioner to adjust the matters in dispute, and especially the excess of land which had been certified to the State above what it was entitled to receive under the act of Sept. 4, 1841, and the lands falling due under the joint resolution of March 2, 1861, and the act of July 12, 1862.

This act contained the following section: —

"SECT. 2. Said commissioner shall proceed to Washington City, and present said claims to the Department of the Interior, and urge the same to settlement as early and as speedily as may be consistent with the interests of the State, and he is hereby authorized to adjust the said excess of the 500,000-acre grant by permitting the United States to retain, out of the indemnity land falling to the State under said act of Congress of July 12, 1862, an amount equivalent to such excess: *Provided*, that nothing herein contained shall be construed to be a relinquishment of the claim of the State under the said 500,000-acre grant to the $12{,}813\frac{44}{100}$ acres selected as a part of such grant, and subsequently rejected from a supposed conflict with the act of Congress approved August, 1846, known as the Des Moines River grant; and the said commissioner is hereby instructed to secure a restoration of said selections as a part of the 500,000-acre grant, and a confirmation of the title of the State thereto, as a part of such grant."

Under this authority, an adjustment was had with the United States, by which it appeared that the State was entitled to 558,000$\frac{96}{100}$ acres, under the river grant, and that under the 500,000-acre grant it had received certificates for 22,660$\frac{5}{100}$ acres more than it was entitled to if the 12,818$\frac{51}{100}$ acres, also certified under the river grant, was not included, and 35,478$\frac{54}{100}$ if it was. The excess was charged to the account of the river grant, and a balance struck accordingly. The Navigation and Railroad Company was not a party to this settlement. The adjustment was ratified by an act of the General Assembly of the State passed March 31, 1868.

At the December Term, 1866, of this court, it was decided, in the case of *Wolcott* v. *Des Moines Company* (5 Wall. 681), that the lands included in the river grant above the Fork, as finally settled by Congress, did not pass to the State for the benefit of the railroad companies under the act of 1856, because, at the time of the passage of that act, the lands were reserved for the purpose of aiding in the improvement of the Des Moines River, and, therefore, fell within the proviso limiting the grant to lands not so reserved.

At its December Term, 1869, this court decided in *Riley* v. *Wells*, No. 397 on the docket of the term, but not reported, that the lands above the Raccoon Fork were so far "reserved" by the action of the officers of the United States as not to be subject to pre-emption in 1855, under the tenth section of the act of 1841.

On the 3d of March, 1871, Congress passed an act (16 Stat. 582), ratifying and confirming to the State of Iowa and its grantees the title to the lands, in accordance with the adjustment made in 1866; but expressly provided "that nothing in this act contained shall be so construed as to affect adversely any existing legal rights, or the rights of any party claiming title, or the right to acquire title, to any part of said lands under the provisions of the so-called homestead or pre-empted [pre-emption] laws of the United States, or claiming any part thereof as swamp lands.

At the December Term, 1872, of this court, after full consideration, the cases of *Wolcott* v. *Des Moines Company* and *Riley* v. *Wells* were distinctly affirmed in *Williams* v. *Baker* (17 Wall.

144); and in *Homestead Company* v. *Valley Railroad* (id. 153), it was said to be "no longer an open question that neither the State of Iowa, nor the railroad companies for whose benefit the grant of 1856 was made, took any title by that act to the lands claimed to belong to the Des Moines River grant of 1846, and that the joint resolution of 2d of March, 1861, and act of July 12, 1862, transferred the title from the United States and vested it in the State of Iowa for the use of its grantees under the river grant."

The State voluntarily made itself a party to this suit for the purpose of defending its title to the lands in controversy as part of its school lands. An act of the General Assembly was passed March 12, 1874, authorizing this to be done.

Upon this state of facts the court below granted the relief asked by the bill and sustained the title of Chapman. To reverse that decree this appeal was taken.

The following propositions were relied upon in the argument for the appellants: —

1. That the lands in question were not "reserved" lands within the meaning of the exception in sect. 8 of the act of 1841.

2. That Chapman, claiming as he did under a patent from the State later in date than that to Wolsey, cannot impeach Wolsey's title in this action.

3. That Wolsey was such a *bona fide* purchaser from the State that the grant of Congress under the joint resolution of March 2, 1861, inured to his benefit.

4. That as the lands had been sold by the State previous to Dec. 23, 1853, no title passed to the Des Moines Navigation and Railroad Company under the settlement made upon the authority of the joint resolution of the General Assembly of March 22, 1858.

5. That by the adjustment and settlement between the State and the United States in 1866, the title of the State under the 500,000-acre grant, and as part of the school lands, was confirmed.

These several propositions will be considered in their order.

1. As to the right of the State, on the 20th of February, 1851, to select these lands as part of the 500,000 acre grant.

It has been settled in this court that the title of the Des Moines Company is good as against the State and railroad companies under the railroad grant of 1856, and as against pre-emptioners after 1855 under the act of 1841. We are not asked to disturb these rulings, and should not be inclined to do so if we were. It is contended, however, that the language used in the eighth section of the act of 1841, defining the reservation, is so different from that of the tenth section, under consideration in *Riley* v. *Wells*, and from that of the act of 1856, involved in Wolcott's case and the cases reported in 17th Wallace, as to render our former decisions of no controlling authority on the question now to be determined. We do not so understand the effect of those decisions. Whatever might be the force of such an argument if the cases involving the act of 1856 stood alone, it seems to us impossible to distinguish the question now presented from that disposed of in *Riley* v. *Wells*. In that case the language under consideration was, "lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes;" and in this, "any public land, except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States." In the act of 1856 the corresponding language is, "any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever."

It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved also in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a set-

tlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal. This, it is agreed, settles the present case, unless that decision resulted from the addition of the words, "reserved for saline or for other purposes," which appear in the tenth section and not in the eighth.

The object of all interpretation is to ascertain the intent of the law-makers, — to get at the meaning which they wished their language to convey. A critical examination of particular words is never necessary except in cases of doubt. Sects. 8 and 10 are parts of the same act. By one, a grant of public lands to certain States for certain purposes was provided for, and by the other, pre-emption rights were given to individual citizens. Both had reference to public lands, and gave the respective beneficiaries the power of making their own selections. There seems to be no good reason why the selections of the pre-emptioner should be restricted within narrower limits than those of the State, and we cannot believe it was the intention of Congress to give a State the power to take lands under sect. 8, which had actually been reserved by the United States for any purpose whatever. It is true, in that section only reservation by a law of Congress or the proclamation of the President are specially spoken of, but it must have been the intention to include in this all lawful reservations. In the tenth section a reservation by treaty is specially mentioned; but we can hardly believe it would be seriously contended that, under the eighth section, a State could select lands reserved by a treaty because the word "treaty" was omitted in that section.

The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the Executive Department of the government; and the acts of the heads of departments, within the scope of their powers, are in law the acts of the President. In *Wilcox* v. *Jackson* (13 Pet. 498), the question was directly presented whether a reservation from sale by an order from the War Department was a reservation "by order of the President," and the court held it was. The language of the statute then under consideration was (p. 511), "or which is reserved from sale by act of Con-

gress or by order of the President, or which may have been appropriated for any purpose whatever;" and in the opinion of the court it is said (p. 513): "Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring the reservation to be made, as being in legal contemplation the act of the President; and consequently that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress." That case is conclusive of this, unless the word "proclamation," as used in the present statute, has a signification so different from "order" in the other as to raise a material distinction between the two cases. We see no such intention on the part of Congress. A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox* v. *Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act. This being the case, under our former decisions, no title passed to the State by the approval of the selection of the lands in dispute under the act of 1841. Being lawfully reserved from sale at the time of the selection, they were not included in the grant which that act provided for.

2. As to the right of Chapman to question Wolsey's title.

Of this we entertain no doubt. If the State had no title when the patent issued to Wolsey, he took nothing by the grant. No question of estoppel by warranty arises, neither does the after-acquired title inure to the benefit of Wolsey, because when the United States made the grant in 1861 it was for the benefit of *bona fide* purchasers from the State, under the grant of 1846. This is evident as well from the tenor of the joint resolution of 1861 as from the act of 1862. The relinquishment under the joint resolution is of all the title which the United States retained in the tracts of land above the Raccoon Fork "which have been certified to said State improperly by the Department of the Interior as part of the grant by the act of Congress approved Aug. 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa;" and by the act of 1862. he lands are in terms to be held and applied in accordance with the provisions of the original grant. This legislation, being *in pari materia*, is to be construed together, and manifests most unmistakably an intention on the part of Congress to put the State and *bona fide* purchasers from the State just where they would be if the original act had itself granted all that was finally given for the river improvement. The original grant contemplated sales by the State in execution of the trust created, and the *bona fide* purchasers referred to must have been purchasers at such sales. This being so, the grant when finally made inured to the benefit of Chapman rather than Wolsey. Neither took title from the State at first, and as the final grant from the United States was in legal effect to Chapman or his grantors, he has the right to have that fact declared by a judicial decision against Wolsey, who sets up his adverse claim.

3. As to the alleged *bona fide* purchase of Wolsey.

This has been substantially disposed of by what we have already said. He purchased under the school-land grant. His patent so in terms declares. Consequently he cannot be a purchaser under the river grant, to confirm which, as has been seen, the legislation of 1861 and 1862 was had.

4. As to the adjustment of 1866.

We are clearly of the opinion that this adjustment settled no

rights as between any other parties than the State and the United States. The conflicting claimants were not parties to that settlement. The agent of the State was instructed not to relinquish the claim of the State under the school-land grant, and he did not do so. The United States simply applied themselves to the adjustment of quantities under all the grants, and whenever they did speak were careful to say that nothing which was done should be construed as affecting adversely any existing rights. The result was to leave the whole question to the ultimate determination of the courts.

5. As to the right of the governor to convey the lands in question to the Des Moines Company under the joint resolution of March 22, 1858, authorizing a conveyance upon settlement with the company.

The original contract between the State and the company contemplated a conveyance of all the river-grant lands not sold by the State on the 23d of December, 1853. This should be construed in the light of the fact that the act making the river grant provided for sales of the granted lands to furnish the means of making the required improvement, and if this contract stood alone, we should have no hesitation in holding that the sales referred to were such as had been made in the execution of the trust under which the lands were held, but if there could be any doubt on that subject, the resolution which authorized the settlement removes all grounds for discussion. By that resolution, all the lands which had before that time been approved and certified to the State under the river grant were to be conveyed to the company, excepting such as had been sold or agreed to be sold by the officers of the State prior to Dec. 23, 1853, "under said grant." The land now in controversy had been so certified, and it had also been sold under that grant. Therefore, the governor was expressly authorized to include it in his conveyance.

This disposes of all the questions urged upon our consideration, and the decree of the court below is consequently

Affirmed.

LITCHFIELD v. COUNTY OF WEBSTER.

COUNTY OF WEBSTER v. LITCHFIELD.

1. *Wolsey* v. *Chapman* (*supra*, p. 755) reaffirmed.
2. This court adhering to the construction given by the Supreme Court of Iowa to the revenue laws of that State touching the time when lands located or entered under the laws of the United States, or purchased from the State, become taxable, *holds* that the lands, the title whereto by the joint resolution of Congress approved March 2, 1861 (12 Stat. 251), passed to *bona fide* purchasers of that State, were not subject to taxation prior to the year 1862.
3. Where the State claimed adversely to the true owner a part of said lands, and there was a controversy whether the title to the remainder had passed from the United States, and, on that account, the proper authorities of the State gave notice to the parties in interest that no legal steps would be taken to enforce the collection of the taxes until the title should be adjusted, — *Held*, that the statutory interest, which is in the nature of a penalty, cannot be exacted for non-payment of them within the time prescribed by law, where the owner, on the adjustment of the title, offered to pay so much of them as was actually due, with interest thereon at the rate allowed by law for delay in the payment of ordinary debts, and his offer was refused.
4. A court of equity has, under such circumstances, the power to grant relief by enjoining the collection of such statutory interest.

APPEALS from the Circuit Court of the United States for the District of Iowa.

Litchfield filed, Sept. 29, 1873, his bill of complaint against the county of Webster, Iowa, and Hutchinson, its treasurer, seeking to enjoin the collection of the taxes levied for 1859, 1860, 1861, 1862, 1863, 1864, 1865, and 1866 on lands whereof he claimed to be the owner. They amount to $32{,}602\frac{92}{100}$ acres, and are situate in that county in the alternate odd-numbered sections, within five miles of that part of the Des Moines River which is above the Raccoon Fork.

The principal of the taxes, when the case was submitted to the court below, was $10,174.76, and the penalty claimed for the non-payment of them, $64,235.41, making a total of $74,410.17.

These lands are a portion of those, which gave rise to a long protracted controversy, of which *Wolsey* v. *Chapman* (*supra*, p. 755) furnishes a complete history.

The facts which this suit involves are stated with sufficient fulness in the opinion of the court.

The court below, considering the penalties prescribed by the revenue laws of Iowa, as in the nature of interest rather than as statutory penalties proper, held that the complainant, by reason of the acts of the State and its officers, was entitled to relief upon his paying the full amount of taxes from 1862 to 1866 inclusive, with annual interest thereon at the rate of six per cent; and that the lands were not subject to taxation for the preceding years. A decree was entered accordingly, and each party appealed.

Mr. George G. Wright for Litchfield.
Mr. John F. Duncombe, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The primary question to be decided in this case is as to the time when the lands which passed to the *bona fide* purchasers from the State of Iowa under the joint resolution of Congress approved March 2, 1861 (12 Stat. 251), became taxable by the laws of the State. The controversy is about taxes assessed for the years 1859, 1860, 1861, 1862, 1863, 1864, 1865, and 1866.

The facts affecting the title are fully stated in *Wolsey* v. *Chapman* (*supra*, p. 755), where we held, following the principles settled in *Dubuque & Pacific Railroad Co.* v. *Litchfield* (23 How. 66), *Wolcott* v. *Des Moines Company* (5 Wall. 681), *Riley* v. *Wells*, not reported, *Williams* v. *Baker* (17 Wall. 144), and *Homestead Company* v. *Valley Railroad* (id. 153), that the United States continued to own the lands until the adoption of the joint resolution. No lands were included in the original river grant of 1846, except those below the Raccoon Fork. While on account of the action of the Executive Department of the general government those above the Fork were reserved from sale and did not pass to the State when selected as school lands under the act of 1841, or as railroad lands by the grant of 1856, and were not open to pre-emption entry, they were not actually donated by the United States to the State, or to the purchasers from her, until the joint resolution was adopted. The grant made by that resolution was just as much an original grant as if the act of 1846 had never

been passed. The order of the Executive Department, reserving them from sale, neither transferred any title to, nor created any interest in, the State. It simply retained the ownership in the United States. While the subsequent gift was undoubtedly induced by what had happened before, the United States, until it was made, continued to be the proprietor of the lands, both in law and in equity. Such being the case, they were not taxable before March 2, 1861. They, down to that time, actually belonged to the United States, and no one else had any interest whatever in them.

This disposes of the taxes for the years 1859 and 1860, but another question arises as to those of 1861. Under the revenue laws of Iowa, in force at that time, government lands entered or located, or lands purchased from the State, could not be taxed for the year in which the entry, location, or purchase was made. Laws of Iowa, Rev. 1860, p. 110, sect. 711, par. 7. In *The McGregor & M. Railroad Co.* v. *Brown* (39 Iowa, 655), this was held to mean that government lands were not taxable until the next year after a patent could be demanded for them. To the same general effect are *Iowa Falls & Sioux City Railroad* v. *Cherokee County*, 37 Iowa, 483; *Goodrich* v. *Beaman*, id. 563; *Iowa Falls & Sioux City Railroad* v. *Woodbury County*, 38 id. 498. The revenue year of the State for 1861 commenced before March. It is clear, therefore, that the lands were not taxable for that year. They were neither entered, located, purchased from the State, nor patented, within the meaning of the revenue laws, until then.

We think, however, that for the year 1862 and thereafter they were taxable. By the joint resolution, Congress relinquished all the title the United States then retained to the lands which had before that time been certified by the Department of the Interior as part of the river grant, and which were held by *bona fide* purchasers under the State. No further conveyance was necessary to complete the transfer, and the description was sufficient to identify the property. The title thus relinquished inured at once to the benefit of the purchasers for whose use the relinquishment was made. All the lands involved in this suit had been certified, and Litchfield, or those under whom he claims, were *bona fide* purchasers from

the State. It matters not, so far as this branch of the case is concerned, that at that time there were doubts as to whether the United States retained any title which could pass under the resolution. That question has now been settled in favor of Litchfield, and it has also been decided that after the resolution went into effect the United States had no longer any interest in the property, legal or equitable. It became private property, and as such subject to taxation under the revenue laws of the State.

It only remains to consider whether, under the circumstances of this case, it is within the power of a court of equity to enjoin the collection of the interest or penalty which the revenue laws of the State require the treasurer of the county to collect in case taxes legally assessed are not paid within the time fixed by law. The statutes regulating this matter are as follows: —

"SECT. 759. On the first day of February, the unpaid taxes, of whatever description, for the preceding year shall become delinquent, and shall draw interest, as hereinafter provided; . . .

"SECT. 760. The treasurer shall continue to receive taxes after they have become delinquent, until collected by distress and sale; but if they are not paid before the 1st of March, he shall collect as a penalty for non-payment, from each tax-payer so delinquent, one per cent of the amount of his tax additional, and if not paid before the first day of April, he shall collect another one per cent additional, and so for each full month which shall expire before the tax shall have been paid. The treasurer shall, in all cases, make out and deliver to the tax-payer a receipt for taxes paid, stating the time of payment, the description of the land, the amount of each kind of tax, the interest on each, and costs, if any, giving a separate receipt for each year; and shall make the proper entries of such payments in the books of his office, and such receipt shall be in full for his taxes that year; . . ."

By sect. 761 the clerk of the county board of supervisors is required to keep full and complete accounts with the county treasurer, and, among other things, to charge him with "interest on delinquent taxes," and "on the first day of each month ascertain the amount of delinquent and unpaid taxes of all classes on said day, and charge said treasurer in said account

with one per cent on the amount thereof to be collected by him, as provided in sect. 52 [sect. 760] of this act." Laws of Iowa, Rev. 1860, pp. 118, 119. On the first day of October in each year the treasurer is required to offer at public sale all the lands on which the taxes for the previous year had not been paid. Of this sale notice was to be given by advertisement. Sect. 763, p. 119.

It appears from the agreed statement of the parties that the lands about which this controversy arises amount in the aggregate to $32{,}602\frac{22}{100}$ acres. Of this, 3,301 acres are part of the school lands selected by the State under the act of 1841, the particulars of which appear in *Wolsey* v. *Chapman* (*supra*), and about 17,000 acres fall within the limits of the railroad grant of 1856, also referred to in that case. In respect to the school lands, it appears that the State has at all times claimed title adverse to that of Litchfield and his grantors. In the adjustment of the controversies with the United States, as was seen in that case, the agent acting on behalf of the State was specifically required not to relinquish any claim of the State to its selections under the act of 1841; and even at the present term of this court the State has appeared here as a litigant, asserting its own title and that of its grantees as superior and paramount to that of Litchfield.

As to the railroad grant of 1856, the agreed statement shows that on the demand of the State the 17,000 acres now in controversy were certified for the benefit of the Dubuque and Pacific Railroad Company. This claim on the part of the State was maintained and constantly asserted adversely to Litchfield until the case of *Wolcott* v. *Des Moines Company* (5 Wall. 681) was decided in this court at the December Term, 1866. That decision settled the dispute as to these lands, and from that time Litchfield has paid all taxes as they were annually assessed.

The State has never claimed adversely to Litchfield any portion of the remaining 12,000 acres, but the United States maintained that the title did not pass by the joint resolution of March 2, 1861, so as to cut off pre-emption and homestead entries. That question remained open until the December Term, 1869, of this court, when it was settled in the case of *Riley* v.

Wells. Until then, or, at least, until the adjustment between the United States and the State, in 1866, the title of the navigation company and its grantees to this portion of its lands was disputed by the United States, and sales conflicting with those of the navigation company were made at the government land-offices.

On the 21st of September, 1860, the treasurer and recorder of Webster County wrote to the agent of the navigation company, the grantor of Litchfield, to the effect that the lands were on the tax-book, but that until the title was adjusted they would not be advertised for sale. Before that time, on the 14th of June, 1860, the auditor of state wrote the auditors of the several counties in which the disputed lands were situated, as follows:—

"We conclude, in view of the so-called river lands, and the further question as to their being liable to tax, that it would be well not to offer them for sale for the taxes until these matters are determined or adjusted in some manner. There are two questions in regard to them. Firstly, has the State any title to them under the river grant? which it is reported has been decided in the negative, but of which we have no official information; 2d, whether they are taxable prior to 1859 as the property of the river company or their grantees. The last question I thought had been decided by our courts, but learn from Attorney-General Rice that there is some doubt about it. Upon the whole, it is thought best not to sell at present, lest it may lead to unnecessary trouble and expense."

It also appears from the statement of facts that during the years 1863, 1864, 1865, and 1866 the taxes charged against the property were in some particulars in excess of what the law allowed. No person was designated on the tax-book as owner. Any one could pay the taxes and get a receipt. If one of the contesting claimants paid them supposing the lands were his, he could not, if he finally failed to maintain his title, recover from the real owner what he thus advanced. We so held in *Homestead Company* v. *Valley Railroad*, 17 Wall. 153.

It thus appears that while Litchfield or his grantor was in reality the owner of the lands from 1862 to 1866, and bound

to pay the taxes for those years as assessed, the State, from which the taxing power came, disputed his title and set up an adverse claim in its own right to something more than 20,000 acres. At the same time, the United States disputed his ownership of the remaining 12,000 acres. All this was known to the State authorities, and in view of the facts the State, by its proper officer, gave notice to the parties in interest that the lands would be put on the annual tax-books and charged with the taxes the owner should pay, if the title had passed out of the United States or the State, in law or in equity, but that, to avoid "unnecessary trouble and expense," no legal steps would be taken to enforce the collection "until the title was adjusted." This we understand to be the legal effect of the instructions of the auditor of state to the treasurers of the several counties in which the disputed lands were situated, and the communication from the treasurer of Webster County to the agent of the navigation company, made while the tax-books of 1859 and 1860 were in his hands for collection. As soon as the title was adjusted, and even before, Litchfield or those under whom he claims commenced the payment of the annual taxes as they fell due, and offered to pay those of 1862, 1863, 1864, 1865, and 1866, with interest at the rate allowed by law for delay in the payment of ordinary debts; but the treasurer declined to receive less than the statutory interest or penalty, unless the taxes of 1859, 1860, and 1861 were included. Although the lands were advertised for sale in 1862 and annually thereafter, they were purposely withheld from sale until this suit was commenced.

Under these circumstances, we think equity may relieve against that part of the statutory interest which is in the nature of a penalty. This provision was undoubtedly made to secure promptness in the payment of taxes when actually due and demandable. It was evidently not intended so much as punishment for non-payment as compensation for delay. In all parts of the statute, except sect. 760, it is spoken of as interest. In one place in that section it is termed a penalty, but in another referred to as interest. The amount increases as the time of payment is put off. Now it seems clear to us that if a State, under whose authority a tax is levied, sets up a title

in itself to the property taxed adverse to that of the true owner, and, to save "unnecessary trouble and expense," forbears to enforce the collection until the "title is adjusted," no claim can properly be made for extraordinary compensation on account of a delay in payment of the tax which may fairly be said to have been brought about by its own wrongful acts. Under the circumstances, Litchfield and his grantor might well have supposed that the taxes as charged were not to be treated as "delinquent," until in some form it had been determined whether the lands taxed were in law taxable. It now appears that the adverse claims of the State and the United States were unjust, and that Litchfield is bound for the payment of the taxes of 1862 and thereafter. He, therefore, actually owes the money called for by the taxes, and may properly be charged with such interest after the taxes became due as is by law payable on other money obligations; but the extraordinary compensation given by the statute for delay in payment of taxes charged on the tax-books, and in the regular process of collection, occupies a different position. It is an elementary principle in equity jurisprudence, that if money is lying dead to meet an obligation, and delay in its payment is caused by the fault of him to whom it is to be paid, interest during the delay is not recoverable. Here the delay was caused by the improper interference of the State and the United States with the title. Litchfield himself has been guilty of no fraud or wilful default. The State has voluntarily abstained from enforcing the collection because of doubts about its right to do so, and Litchfield has had the use of his money while the dispute remained unsettled. As soon as the title was adjusted he offered to pay what was actually due, with ordinary interest; and this was refused. Under these circumstances, we think the court below was right in enjoining the collection of all penalty or interest in excess of six per cent per annum. In *Stryker* v. *Polk County* (22 Iowa, 137), there is a strong intimation that in a case like this such relief might be granted. None of the objections which were found to granting the injunction asked for in that case exist here, and it is clearly made to appear that the action of the State affected the title of this plaintiff prejudicially. Such a case was made by the bill, and established by the evi-

dence. It may fairly be inferred from what is said in *Litchfield* v. *County of Hamilton* (40 Iowa, 66), that in such a case the courts of the State would afford the remedy.

Although taxes in Iowa are levied and collected by the counties, all is done under the authority of the State, and the counties are charged with whatever is done by the State affecting the rights of the tax-payer. No complaint is made by Litchfield of the amount found due from him by the court below, if the decree is in other respects right, as we find it to be.

Decree affirmed, each party to pay the costs of his own appeal.

NOTE. — In *Litchfield* v. *County of Hamilton*, error to the Supreme Court of the State of Iowa, which was submitted on printed arguments by *Mr. George G. Wright* for the plaintiff in error, and by *Mr. Daniel D. Chase* for the defendants in error,

MR. CHIEF JUSTICE WAITE, in delivering the opinion of the court, remarked, that the only Federal question presented was whether the lands in Hamilton County, which Litchfield held by the same title he did those in Webster County, involved in the preceding case, were taxable for the years 1859, 1860, 1861, 1862, 1863, 1864, and 1865. For the reasons stated in the other case, the court held that the taxes for 1859, 1860, and 1861 were illegal, and their collection should be enjoined, but that those for 1862 and the following years were properly collectible. The court below decided that they were legally assessed for all the years, and decreed that they be paid in full, with all interest, penalties, and costs. The liability of Litchfield for interest and penalties after 1861 did not present any Federal question.

The decree of the State court was reversed, and the cause remanded with directions to enjoin the collection of all taxes and charges on the lands in question for the years 1859, 1860, and 1861, but with leave to enter such further decree in reference to the taxes of 1862 and thereafter as the court should be advised might be proper under the circumstances.

YOUNG v. BRADLEY.

1. Whatever may be the terms creating a trust estate, its nature and duration are governed by the requirements of the trust.
2. A. died in 1867. By his last will and testament he devised his entire estate to B., in trust, first, to set apart a certain house and its contents, together with one-third of the net income of his estate, to his widow for her natural life; then to divide said estate into four equal parts, and allot one to his son C., another to the children of the latter, and the remaining two to his daughters D. and E. respectively; then, upon the death of said widow, to set apart to D. and E. the house occupied by her, the same being a charge against their respective shares of the estate; next to hold the shares of said D. and E., in trust, for their sole and separate use, free from the control of their husbands, during their respective natural lives; but in the event of either of them dying without issue her share should go to the children of C. The will further provided that B. should have the largest powers and discretion in taking charge of and managing the estate, and authorized him to have, hold, direct, and control the aforesaid trust property, according to his best judgment, and to sell and dispose of the same, or any parts thereof, from time to time, subject only to the aforesaid trusts, and as freely as A. could do if living; and also in all things to have the same powers, rights, privileges, benefits, advantages as A. might have, if living, in all and any contracts, bargains, agreements, companies, or other compacts to which he, A., was a party. By consent of the parties interested, no division or distribution of the estate was made. The widow died in 1868, C. in 1869, and D. and E. in 1870, both of the latter without issue. In 1871, B., as trustee, conveyed certain parts of the real estate to F. Thereupon C.'s children filed this bill to have the conveyance set aside as null and void, and for a decree entitling them to the possession of the premises. *Held*, 1. That at the time B. undertook to sell the property to F., the trust estate created in him by the will of A. had become extinct. 2. That his powers as trustee having ceased, his conveyance to F. was void.

APPEAL from the Supreme Court of the District of Columbia.

William A. Bradley, of the city of Washington, died in 1867, leaving a last will and testament, as follows: —

"I, William A. Bradley, of the city of Washington, being of sound disposing mind, memory, and understanding, do make and publish this my last will and testament, hereby revoking all and every other will heretofore made by me.

"Item first. After the payment of my just debts and funeral expenses by my executors hereinafter named, I give, devise, and bequeath all of my estate, real, personal, and mixed, of whatever kind it may be, and wheresoever situated, to my son, William A. Bradley, Jr., and my cousin, A. Thomas Bradley, their heirs, execu-

tors, and administrators, the survivor of them, his heirs, executors, and administrators, in trust, first, to set apart the house in which I now reside, on New York Avenue, in the city of Washington, together with all and singular the household effects, including pictures, plate, books, and other chattels now therein, or therein at the time of my death, to my dear wife, to be held exclusively by her during her natural life; and out of the net income derived from my said estate of every sort to pay to her one equal third part annually, or quarter-yearly, as she may prefer, so long as she shall live.

"Next, I direct my said trustees, and the survivor of them, to divide all of my said estate immediately after my death, including that which is real, personal, or mixed, into four equal parts, as near as in their or his judgment and valuation can be done, and if they cannot agree they shall select a competent disinterested third to aid them in such division and valuation, and the decision of any two of said three persons shall determine said division and valuation; and of these parts my said trustees, or said survivor, shall allot one part to my said son, William A. Bradley, Jr.; one part to the children of my said son, now or hereafter born in lawful wedlock; one part to my daughter, Jeanette H. Linton; and one part to my daughter Sidney T. Edelin, whose portion shall embrace the property owned by me situated in Corning, Steuben County, in the State of New York, and known as and termed in my family the 'Corning property;' and if either or both of my said daughters die without issue, either before or after my death, her or their said fourth parts shall go to the children of my said son now and hereafter born, share and share alike, subject as to Sidney's portion to the subsequent provisions in this will.

"Next, upon the death of my said wife, I direct my said trustees, and the survivor of them, to add to the parts set apart to my said daughters the house specially set apart for my said wife for life, the same being an equal charge upon their portions during her said life, and charging them on their said parts each five thousand dollars for their respective interest in said property; and they or the survivor of my said trustees shall also take into possession the said household effects and other chattels, and make, according to his or their judgments, an equal distribution of the same in kind as to the whole, or in part as to some, and in the proceeds of sales as to others, among the parties entitled to take real estate under this my will, and in the same proportions.

"Next, if my said daughter Sidney T. dies before her present husband, and he survives me, and she leaves no issue, then I direct

my said trustee, and the survivor of them, to convey to said Sidney T.'s husband, Dr. Alfred Edelin in fee-simple, that part of my estate known as aforesaid as the 'Corning property.'

"Next, I direct my said trustees, and the survivor of them, to hold the portions my said daughters receive under this my will, in trust, to and for their respective, sole, and separate use, as if *femes sole*, and never married, free from the control of any present or future husbands they or either of them may ever have, and not to be in any manner subject to the control or liable for the debts of such husbands for and during their respective natural lives; and if either of them dies before or after me leaving issue, such issue shall have the mother's part, share and share alike, to be held in trust for them by my said trustees and the survivor of them, until the youngest of such issue shall attain the age of twenty years, or in the discretion of my said trustees and the survivor it may appear best to terminate said trusts; and in the absence of issue of either or both of them, then to follow the dispositions hereinbefore provided in that event; but whether with or without issue of my said daughter Sidney T., nothing shall be herein understood to prejudice the conditional estate hereinbefore provided for her said husband.

"Next, I direct that upon the division into four parts hereinbefore prescribed, my said son, William A. Bradley, Jr., or his heirs, shall have and receive his portion immediately, except only his distributive share in the personal property left to my wife for her life, and free from any and all trusts whatever contained in this will.

"Item second. I give and bestow upon my said trustees and the survivor of them the largest powers and discretion in taking charge of and managing my estate, and authorize them and the survivor to have, hold, direct, and control the aforesaid trust property according to their or the survivor's best judgment, and to sell and dispose of the same, or any parts thereof, from time to time, subject only to the aforesaid trusts, and as freely as I myself could do if living; and also in all things to have the same powers, rights, privileges, benefits, advantages as I myself have, or might have if living, in all and any contracts, bargains, agreements, companies, or other compacts to which I am now or may become a party.

"Item third. I nominate, constitute, and appoint my said trustees, and the survivor of them, executors and executor of this my last will and testament.

"In witness whereof, I have hereto set my hand and seal this seventh day of August, in the year eighteen hundred and sixty-six.

"W. A. BRADLEY." [SEAL.]

The testator's widow died in 1868, his son in 1869, and his daughters, without issue, in 1870.

Under item second of the will, A. Thomas Bradley, the other trustee being dead, undertook as surviving trustee, in June, 1871, to convey to Mark Young certain mill property in Georgetown, whereof the testator died seised. To recover it this bill was brought by the children of William A. Bradley, Jr., son of the testator.

The court below held the conveyance void for want of power in the trustee to make it, and granted the relief prayed in the bill. Young thereupon appealed to this court.

Mr. Enoch Totten for the appellant.

Mr. Walter D. Davidge and *Mr. Reginald Fendall, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The decision of this case turns upon the construction of the powers conferred by the will on the trustees named in it.

As this question of power is the principal one in the case, a critical examination of the terms of the will as connected with the condition of the trust estate and of the *cestuis que trust*, at the time of the execution of the deed, becomes necessary.

The will begins by a declaration that the testator gives, devises, and bequeaths all of his estate, real, personal, and mixed, of whatever kind it may be, and wherever situated, to William A. Bradley, Jr., his son, and A. Thomas Bradley, his cousin, and to the survivor and his heirs in trust. Then follows the distinct declaration of these trusts, the first of which is of the house in which he lived, and its furniture, and one-third of the net income of his estate besides, to his wife during her life. He next directs that the trustees shall divide all his estate immediately after his death into four equal parts, and allot them as follows: One part to his son William, who shall receive his portion at once; one to the children then living or thereafter born to said William; one to Mrs. Linton, a married daughter; and one to Mrs. Edelin, another married daughter. The portions left to the two daughters were to include the homestead, for which each of them was to be charged $5,000 in dividing the property; "and the trustees or the survivor of my said trustees shall also take into possession the said house-

hold effects and other chattels, and make, according to his or their best judgments, an equal distribution of the same in kind as to the whole or in part as to some, and in proceeds of sales as to others, among the parties entitled to real estate under this will, and in the same proportions."

He next directed the trustees to hold the portions of his daughters in trust for their sole and separate use, free from the control of their husbands and from liability for their debts; and he provided for such disposition of their respective shares on their death that all the interest of both of them, and in fact all the beneficial interests under the will, had vested in the children of William A. Bradley, Jr., at the time the deed to Young was made by A. Thomas Bradley. This resulted from the death of each daughter childless, and the death of testator's wife and son.

By the unanimous request of the persons interested under the will, no division into four parts and no distribution of the estate was ever made. As we have already said, by reason of the death of all the beneficiaries under the will except the children of W. A. Bradley, Jr., and by the payment of all the debts of the testator, the entire interest in the estate of the testator had become vested in them; and, under these circumstances, the inquiry is, what authority had the surviving trustee to sell real estate.

The legal title, it is argued, is vested in him by the will. The power conferred by item second is as ample as language can make it, with the single limitation that it is subject to the trusts of the will. The estate vested in the trustees was designed to enable them to execute these trusts. It was not an estate to last for ever. The things to be done by the trustees were defined, and in the nature of things were to have an end.

What were the purposes for which this trust was created, and what remained for a trustee to do in execution of them?

1. They were to hold for the benefit of the widow, during her life, and see that she received the one-third of the annual income of his estate. She is long since dead, and that trust has ceased.

2. We may suppose that in making the partition and distribution, sales to equalize, and conveyance to the distributees

were necessary. The whole interest has become vested in one of the four distributees of the will, and nothing remains to be done under the trust in regard to that distribution.

3. The trustees were to hold the shares of the daughters as a protection against their husbands, and for the children of these daughters until the youngest of such children should attain the age of twenty-one years, unless in the discretion of the trustees it should appear best to terminate the trust earlier. There were no such children of the daughters, and the daughters are both dead.

There was no such control over the distributive shares of the children of W. A. Bradley, Jr., and as the whole of it has come to them, the trustees are not their trustees as they were of the widow of the testator, his daughters, and their children if there had been such.

These are all the trusts declared by the will. They were all performed, superseded, or terminated before the deed to Young was made. The trustee in making that deed was discharging no trust reposed in him and no duty required of him by the will. It is not suggested anywhere that any such purpose was in view. It is said that the property was dilapidated and needed repair. But as it belonged to Mrs. Bradley and her children, and as the will did not confer on the trustees any guardianship or control over the property of the testator's son's children after their share was allotted to them, the trustees had no power over it when it came to them by the other provisions of the will on the death of the other devisees.

The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee-simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs for ever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest.

Mr. Perry, in his work on Trusts, supports by a very full array of authorities these two propositions in regard to the construction of instruments out of which trust estates arise: 1. "Whenever a trust is created, a legal estate sufficient for

the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not." 2. "Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires." Perry, Trusts, sect. 312. Again, he says: "In the United States, the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is, that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less." Sect. 320.

The case of *Noble* v. *Andrews* (37 Conn. 346) bears a strong analogy to the one before us in principle, where it was held that a gift to a person in trust for a wife during her life, and to her heirs for ever, subject to her husband's curtesy, conveyed to the trustee only an estate for the life of the wife, and at her death the trust ceased.

This subject is considered and the authorities fully reviewed by Mr. Justice Swayne, in *Doe, Lessee of Poor*, v. *Considine*, 6 Wall. 458. "It is well settled," says he, "that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation."

We are satisfied that, at the time A. Thomas Bradley undertook to sell to Mark Young the property in controversy, the trust estate created in him by the will of William A. Bradley, Sen., had become extinct, and that his conveyance was void because his powers as such trustee had ceased.

Two minor objections are taken to the decree which require notice.

1. It is said that the amount charged to Young for the use and occupation of the property is excessive. It is a sufficient answer to this to say that the matter was referred to an auditor, on whose report the decree in that respect was based, and that no exception was taken to his report.

2. It is alleged for error also that no provision is made by the decree to refund to Young the purchase-money, amounting to about $10,000, paid by him under the contract. At first blush, this demand of Young to have his money or the property seems just.

The court below seemed to be impressed with this view of the matter, for in the order of reference to the auditor, who in that court performs the functions of a master in chancery, he was directed to report "how much, if any, of the money paid by said Mark Young to A. Thomas Bradley went to the benefit and advantage of the complainants." And he reported that none of it did. To this branch of the report there was no exception, though an effort was made, after the time for it had passed, to except to other parts of the report. So that we are concluded by that report.

But in the view we have taken of the case the sale by Bradley was utterly void. The complainants are entitled to their property and compensation for its use, and the matter of the return of the money to Young is one solely between Bradley and him, with which these complainants have nothing to do. It is not the rescission of a valid contract, in which case the parties must be placed *in statu quo*, but the recovery of property held on a void deed with a declaration of its original nullity.

Decree affirmed.

POWERS *v.* COMLY.

Opium, the product of Persia, imported to the United States from a country west of the Cape of Good Hope, is subject to the additional duty of ten per cent *ad valorem* imposed by the third section of the act of June 6, 1872. 17 Stat. 232; Rev. Stat., sect. 2501.

2. That act is not in conflict with the treaty between the United States and Persia. 11 Stat. 709.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This suit was brought by Powers & Weightman, of Philadelphia, against the collector of that port to recover the additional duty of ten per cent *ad valorem*, exacted by him under the third

section of the act of June 6, 1872 (17 Stat. 232; Rev. Stat., sect. 2501), upon certain opium imported by them in 1874 from Liverpool, it having previously been exported from Persia to England, by way of the Isthmus of Suez and the Mediterranean. That section is as follows: —

"That on and after the first day of October next, there shall be collected and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope (except wool, raw cotton, and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty of ten per cent *ad valorem*, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production."

Judgment was rendered for the defendant. The plaintiffs sued out this writ.

Mr. Henry Flanders for the plaintiffs in error.
The Solicitor-General, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case is substantially disposed of by *Hadden* v. *The Collector* (5 Wall. 107) and *Sturges* v. *The Collector*, 12 id. 19. Sect. 3 of the act of June 6, 1872 (17 Stat. 232), is in all material respects like the statutes under consideration in those cases where we held that countries "beyond the Cape of Good Hope" and countries "east of the Cape of Good Hope" meant countries with which, at that time, the United States ordinarily carried on commercial intercourse by passing around that cape. Although the act of 1872 was passed after the Suez Canal was in operation, we see no indication of an intention by Congress to give a new meaning to the language employed which had already received a judicial construction. The words used are words of description, and indicate to the popular mind the same countries now that they did before the course of trade was to some extent changed by cutting through the Isthmus of Suez. The object of Congress was to encourage a direct trade with these Eastern countries. For this purpose,

in legal effect, a bounty was offered to those who imported the products of that region directly from the countries themselves, instead of from places west of the Cape.

We see nothing in the act of Congress which is in conflict with the treaty with Persia. 11 Stat. 709. If the subjects of Persia export their products directly to the United States, they are required to pay no more duties here than the "merchants and subjects of the most favored nation." It is only when their products are first exported to some place west of the Cape, and from there exported to the United States, that the additional duty is imposed. Under such circumstances, the importation into the United States is not, commercially speaking, from Persia, but from the last place of exportation.

Judgment affirmed.

WRIGHT v. NAGLE.

1. This court follows the decision of the Supreme Court of Georgia, that authority to grant the franchise of establishing and maintaining a toll-bridge over a river where it crosses a public highway in that State, is vested solely in the legislature, and may be exercised by it, or be committed to such agencies as it may select.
2. The construction by the State court of a statute under which a court made an exclusive grant of such franchise within designated limits, upon conditions which the grantee performed, is not conclusive here upon the question whether a subsequent conflicting grant impairs the obligation of a contract.
3. The statutes of Georgia confer upon certain courts the power to establish such bridges, but not to bind the public in respect to its future necessities. The legislature could, therefore, authorize the erection and maintenance of another bridge within the limits of the original grant.

ERROR to the Supreme Court of the State of Georgia.

The facts are stated in the opinion of the court.

Mr. Fillmore Beall and *Mr. O. A. Lochrane* for the plaintiffs in error.

Mr. Joel Branham, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in equity brought by Wright and Shorter in

the Superior Court of Floyd County, Georgia, to restrain the defendants from continuing and maintaining a toll-bridge across the Etowah River, at Rome, in that county. The facts are these: In July, 1851, the Inferior Court of Floyd County entered into a contract with one H. V. M. Miller, by which the court, for a good and valuable consideration, granted to Miller and his heirs and assigns for ever, so far as it had authority for that purpose, the exclusive right of opening ferries and building bridges across the Oostanaula and Etowah Rivers, at Rome, within certain specified limits. Miller, on his part, bound himself by certain covenants and agreements appropriate to such a contract. He afterwards assigned his rights under the contract, so that when this suit was commenced the complainants, Wright and Shorter, were the owners. Large amounts of money were expended in building and maintaining the required bridges, and the franchise is a valuable one. In December, 1872, the commissioners of roads and revenue for the county authorized the defendants to erect and maintain a toll-bridge across the Etowah, within the limits of the original grant to Miller. The bill avers that "the said board of commissioners in the making and conferring of said franchise exercised legislative powers conferred upon it by the laws of the State; that the said grant is in the nature of a statute of the legislature; that the same is an infringement of the said grant and contract made by the said superior (inferior) court to and with the said H. V. M. Miller, under whom complainants hold, and impairs the obligation and validity thereof, and is repugnant to the Constitution of the United States, art. 1, sect. 10, par. 1, which prohibits a State from passing any law impairing the obligation of contracts; and the complainants pray that the said grant to said defendants be by this court annulled and declared void, and the defendants perpetually enjoined from any exercise of the privileges thereby conveyed and granted."

There is no dispute about the facts, and in the answer it is expressly stated that the commissioners of roads and revenue "are vested with legislative, or quasi-legislative, powers and exclusive powers on this subject, and, therefore, . . . the order making said bridge and streets public has all the authority, sanction, and effect of an act of the legislature of the State, and

cannot be interfered with by the unauthorized and void act of any public functionary of this State." The parties, by stipulation before the hearing, eliminated every thing from the case except so much as was necessary to obtain "a final and legal decision upon the main question; to wit, whether or not the Inferior Court of Floyd County, Georgia, could and did grant to the complainants, or their assignors, an exclusive franchise, such as is set up and claimed in the complainants' bill, and whether or not, therefore, the subsequent grant of the bridge franchise, described in the pleadings, by the said board of commissioners to the defendants, is or is not valid, and the right of complainants to the relief prayed for." It was also agreed that the defendants had title to the lands on which the piers of the bridge were built.

The Superior Court decided that the inferior court of the county had no power to grant Miller any such exclusive right as was claimed, and for that reason dismissed the bill. This decision was afterwards affirmed by the Supreme Court of the State on appeal, and to reverse that judgment this writ of error was brought.

Accompanying the submission of the case on its merits is a motion to dismiss because no Federal question is involved.

Before proceeding to consider the questions presented by the record, we are called upon to dispose of a preliminary motion. On or before the 6th of December, 1879, the counsel for the respective parties stipulated, in writing, to submit the case on printed arguments under the twentieth rule. The plaintiffs in error ask leave to withdraw their stipulation, and set the cause down for oral argument when reached. We think their showing in support of that motion is insufficient, and that under the rule laid down in *Muller* v. *Dows* (94 U. S. 277) the stipulation must be enforced.

We think, also, that the motion to dismiss must be overruled. It is true, the court below disposed of the case by deciding that the State statutes did not authorize the inferior court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave a construction to a State statute. It is also true that ordinarily such a construction would be conclusive on us. One excep-

tion, however, exists to this rule, and that is when the State court "has been called upon to interpret the contracts of States, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with State legislation." *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436. It has been decided in Georgia that the right to receive tolls for the transportation of travellers and others across a river on a public highway is a franchise which belongs to the people collectively. *Young* v. *Harrison*, 6 Ga. 130. A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll-bridge for public travel. The legislature of the State alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant when made binds the public, and is, directly or indirectly, the act of the State. The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities. *Justices of Inferior Court* v. *Plank Road*, 14 id. 486. The complainants claim they have such a grant through the agency of the inferior court, acting under the authority of the legislature. This is denied, because, as is insisted, the legislature has not given the court power to make an exclusive grant. That was the precise question decided below, and under the exception to the rule just stated is reviewable here.

If the court erred in construing the statute, and in holding that there was no contract, then the question is directly presented by the pleadings and the stipulation as to the facts, whether the subsequent action of the commissioners of roads and revenue is, in its legal effect, equivalent to a law of the State impairing the obligation of the contract as it was made. In this way, it seems to us, a Federal question is raised upon the record, which gives us jurisdiction.

We, therefore, proceed to consider whether the inferior court had the power to grant Miller the exclusive right. It certainly has done so, if the power existed. There is no doubt that the legislature, under the Constitution of the State in force at the time, had authority to make such a grant. The only question

is, whether power for that purpose had been delegated to the inferior court.

The statutes relied on by the plaintiffs in error as conferring that authority are: —

An act of Dec. 1, 1805 (Cobb's Dig. 945), as follows: —

"The inferior courts in the several counties in this State are hereby empowered, if they shall deem it necessary, on application being made, to authorize the establishment of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, and to allow such rates for crossing thereat as are usual or customary on watercourses of the same width: *Provided, nevertheless*, that the legislature shall, at all times, retain the power of making such alterations in the establishments made by the justices of the inferior courts as to them may seem proper."

An act of Dec. 19, 1818 (Cobb's Dig. 952): —

"SECT. 29. The justices of the inferior courts of each county, in this State, or a majority of them, shall have power and authority to hear and determine all matters which may come before them relative to roads, bridges, &c., as are authorized by law, either in term time, or while sitting for ordinary purposes, or at any special meeting held for that purpose."

"SECT. 33. The inferior courts shall have power to establish ferries, to rate the toll to be taken, as well those already established as any which may hereafter be established, within the several counties within which they may severally reside; and, generally, all other matters relative to ferries which may, in their judgment, be of public utility, any law to the contrary notwithstanding."

An act of Dec. 26, 1845 (Cobb's Dig. 958): —

"That the justices of the inferior court of the several counties in this State, or a majority of them, be and they are hereby authorized to contract for the building and keeping in repair of public bridges for such time and in such way as they may deem most advisable, either by letting the same to the lowest bidder, hiring hands for that purpose, or in any other way that to them may appear right and proper. And should they at any time let the same to the lowest bidder, that they be authorized to require and receive the same bond that commissioners now do."

It is conceded that these statutes contain all the authority the inferior court of Floyd County had to make the contract in question. Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from a legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is whether the legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the State to establish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to *establish* ferries or bridges, but not to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rate of toll does not imply a power to bind the State or its instrumentalities not to establish another in case of necessity. In fact, the act of 1805, which remained in full force until the contract with Miller was made, expressly retained power for the legislature to make such alterations of what might be done by the courts as should seem to be proper. The act of 1818 gave the courts general power over all matters relative to ferries, and authorized them to hear and determine all matters which should come before them in relation to roads and bridges; but there was no express repeal of the proviso of the act of 1805, and there is no such inconsistency between the two acts as to amount to a repeal by implication. Such being the case, the original power retained by the legislature over the acts of the courts in this particular remained in full force. The act of 1845 related only to the building and repairing of such public bridges as were not owned by private individuals or corporations. It conferred no new powers in respect to the bargaining away of public franchises. We see nothing in the case of *Shorter* v. *Smith* (9 Ga. 517) to the contrary of this. All the court there decided was that an exclusive right had not been granted. The question of power in the inferior courts to make such a grant was not involved, and certainly not decided. The language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be

extended beyond for any purpose of authority in another and different case.

Upon the whole, it seems to us that the Supreme Court of the State was right in its decision, and the judgment is therefore

Affirmed.

TRENIER v. STEWART.

The concession of certain lands now within the State of Alabama, confirmed to Nicholas Baudin Sept. 15, 1713, by the then governor of Louisiana (*infra*, p. 798), was a complete grant to the donee, and vested in him a perfect title to them.

ERROR to the Supreme Court of the State of Alabama.

This was an action of ejectment brought by the defendants in error in the Circuit Court of Mobile County, Alabama, for the recovery of a parcel of land on Mon Louis Island, a triangular tract of over 14,000 acres of land in the lower part of that county, bounded on the east by Mobile Bay, on the northwest by Fowl River, and on the south by the waters of the sound which separates the mainland, of which Mon Louis Island is a part, from Dauphin Island.

The plaintiffs in proof of their title put in evidence an entry in American State Papers, vol. iii. pp. 19–20, being a part of the report of William Crawford, commissioner under the act of Congress of 1812 and 1813.

"Register of claims to land in the district east of Pearl River in Louisiana, derived from either the French, British, or Spanish government, which, from the circumstances, require a special report:—

"No. 1. By whom claimed: Heirs of Nicholas Baudin.
"Original claimant: Nicholas Baudin.
"Nature of claim and from what authority: French concession.
"Date of claim: 15 Sept., 1713.
"Quantity claimed: Area in arpens, about 14,360.
"Where situated: Fowl River.
"By whom issued: La Mothe Cadillac.
"Surveyed: No survey.
"Cultivation and inhabitation: Proved from 1804 to 1813."

"The claim of the heirs of Nicholas Baudin to an island in Fowl River, being ten or twelve miles in length and from two to three miles wide, is founded on the following documents: —

[Translated from the French.]

"We, lieutenants of the King, and commandant of Fort Louisiana, and Dartiquette, King's counsellor, commissary ordinary of marine, sent by the order of the court into this colony, have agreed for the good of his Majesty's service, in the advancement of this colony, to give contracts of cessions (des contrats des cessions) to several inhabitants, to wit:

"To Nicholas Baudin, the land of Grosse Pointe; to begin at and run along the source of Fowl River till it reaches the oysters (oyster pass) which separate Massacre Island from the mainland, in order to raise cattle thereon.

"Of the said land we have made to him for and in the name of his Majesty, the entire cession, and transfer with its circumstances and dependencies, in order that he, his children, heirs, or assigns, may enjoy and use it from henceforward and for ever, without being troubled or disturbed in the peaceable possession thereof; not pretending, nevertheless, to derogate in any manner from the rights and pretensions which his Majesty might have thereto for the good of his service.

"Done at Fort Louis of Louisiana this 12th November, 1710.

"DARTIGUETTE and
"BIENVILLE."

Below is written: —

"We, the governor of the province of Louisiana, approve and ratify the said present concession.

"Done at Fort Louis, this 15th September, 1713.

"LA MOTHE CADALLAC."

On the margin is sealed a writing, of which the following is a copy: —

"This day, the 16th of July, in the morning, 1761, came to the office of the superior council of the province of Louisiana, Mrs. Francis Paille, widow of the deceased Nicholas Baudin, called Mingoin, an inhabitant of this town, who requested us to receive in deposite, in order to be enrolled on our minutes, the above piece and the other parts, in order that recourse may be had thereto when necessary, and copies thereof delivered to whomsoever of

right may demand them, and declared that she did not know how to write, nor sign this, according to the ordinance. In presence of and assisted by Claude Boriteldet la Leine, her son-in-law.

"BOUTLE,

"And we, the undersigned clerk, CHATAUCOU."

And joined to the original is a small paper attached thereto by a pin, on which is written, in English:—

"Received from Mr. Moulouis two originals and two copies of land grants, 27 December, 1807.

"LUKE RUSSELL."

"I certify that the present copy is conformable to the original among the archives of the government at Mobile. This 16 June, 1783.

"JAMES DE LA LOUSAGAE, *N. Public.*"

"The original of this, which has been presented to me, exists in the archives of government under my care.

"MOBILE, 18th June, 1783. HENRIQUE GRIMAREST."

"Inhabitation and cultivation. — Thomas Powell, being sworn, saith that he knows of his own knowledge that land claimed by the representatives of Nicholas Baudin, on Fowl River, called the Island, has been inhabited and cultivated since the year 1804, and that he believes it was inhabited and cultivated before that period; that four or five acres have been cultivated.

"THOMAS POWELL."

Also the following from the fifth volume of the American State Papers, page 130, to wit: —

"*Special Report, No.* 2.

"Claim of the heirs of Nicholas Baudin to an island in Fowl River, called 'Grosse Pointe' or 'L'isle Mon Louis,' estimated to contain about 14,360 arpens.

"This claim is founded on a French concession given at Fort St. Louis, on the 12th of November, 1710, by Bienville, lieutenant of the King and commandant of Fort Louis, and by Dartiguette, commissary ordinary of the marine.

"These officers in their deed of concession state their power as emanating from the court to make grants of cession (des contrats de cessions) in the province of Louisiana; and under this authority it appears they conceded to Nicholas Baudin, the ancestor of the

present claimants, the island or tract of land called the Grosse Pointe.

"Beneath the concession is an approval and ratification of it by La Mothe Cadallac, the governor of Louisiana, signed on the 15th of September, 1713.

"It also appears from a document appended to the writing above referred to, signed by Boutru and certificate by Chantalon, clerk, that Madame Paille, widow of N. Baudin, the original grantee, presented at the office of the superior council of the province of Louisiana the aforesaid deed of concession, together with its approval and ratification, with the request that they would receive the said documents 'in deposite, in order that they might be enrolled on the minutes of the superior council, that recourse might be had there when necessary.'

"Thus far the steps taken in this concession were, as far as this board have an opportunity of ascertaining in accordance with the usage of the French government in granting lands in its provinces; nor are we aware of any regulation which restricted the authorities of that government in the quantity they might grant. Two certificates were also presented to the board, signed, first, by James de la Sampaye, notary public, dated 16th June, 1783, and, secondly, by Grimarest, Spanish commandant at Mobile, stating that the originals, the subjects of which have been recited, existed at that time in the archives of the government at Mobile. Several witnesses prove that the tract claimed has been inhabited and cultivated from a period prior to 1761 to the present time. The occupancy being uninterrupted for so long a period as is proven, first, under the French grant by which the tract was granted, and successively under the English and Spanish governments, is deemed strongly corroborative of the original grant. The claim is not incumbered by mesne conveyances, but is still in the possession of the descendants of the original grantor.

"This claim is not incumbered with mesne conveyances, but is still in the possession of the descendants of the original grantor.

"From the facts here submitted, the undersigned are of opinion that the foregoing claim is entitled to the favorable consideration of Congress.

"All which is respectfully submitted.

"JNO. B. HAZARD,
"JNO. HENRY OWEN,
"*Board of Com. for the Adjustment of Land Claims in the State of Alabama.*

"ST. STEPHEN'S, Feb. 20, 1828."

The report was made by said commissioners under the authority conferred by the second section of the act of Congress approved March 3, 1827 (4 Stat. 239), and was confirmed by the act approved March 2, 1829 (id. 358), the fourth section of which is as follows: —

"That the confirmation of all the claims provided for by this act shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tracts of land and town-lots so confirmed, and that nothing herein contained shall be construed to affect the claim or claims of any individual, or body politic or corporate, if any such there be."

The plaintiffs also introduced evidence tending to show that the land in the concession mentioned constitutes what is now known as Mon Louis Island; that they derived title to the land in controversy from said Nicholas Baudin, and that the defendants were in possession of it at the commencement of this suit and now.

The defendants denied this, and claimed the land under the heirs of one Henry Francois, to whom, they assert, it was granted by operation of the third section of the act of Congress of May 8, 1822, by reason of said Henry's inhabitation and cultivation of it before 1813, and by a patent from the United States issued May 5, 1870, which was founded on a land-office certificate dated in 1869.

There was a verdict for the plaintiffs, and the judgment entered thereon having been affirmed by the Supreme Court of Alabama, the defendants sued out this writ of error.

The remaining facts, and the instructions given by the court of original jurisdiction to the jury, are stated in the opinion of the court.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the plaintiffs in error.

Mr. John T. Morgan and *Mr. Thomas H. Herndon*, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Claims to land, when the province of Louisiana was ceded to the United States, were, in many instances, incomplete, arising largely from the fact that the governor of the province, during

Spanish rule, never had authority to issue a patent. Laws were accordingly passed by Congress very early after the jurisdiction was transferred, making provision for the adjustment of such inchoate claims, which in one form or another have been continued in force even to the present time.

Concessions of the kind having never received the sanction of the supreme power of the province, they did not have the effect to segregate the tract conceded from the mass of the public lands, from which it followed that when the jurisdiction of the province was transferred by the treaty the legal title to all such tracts vested in the new sovereign until confirmed.

Complete titles, of which there were a few, mostly derived during the dominion of the French, needed no confirmation, as they were fully protected by the treaty.

Sufficient appears to show that the plaintiffs derive their title from Nicholas Baudin, an old French claimant, whose title, as the plaintiffs allege, was confirmed by an act of Congress. 4 Stat. 240. They rely upon the action of the commissioners appointed under that act of Congress, and the proceedings of the commissioners shown in the State Papers, and the confirmation of the same by the subsequent act of Congress relating to the same subject-matter. Id. 358; 3 Am. State Papers, pp. 19, 20; 5 id. 130.

Evidence was given by both parties, as is fully set forth in the transcript and in the report of the case as prepared in the court of original jurisdiction. *Stewart* v. *Trenier*, 49 Ala. 492.

None of the other proceedings in the cause prior to the bill of exceptions and the final judgment removed here for re-examination are material in this investigation, and they are omitted, with the remark that the parties will find them all fully set forth in the statement of the reported case.

Service was made, and the defendants having appeared pleaded the general issue. Both parties gave evidence, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendants, and they appealed to the Supreme Court of the State, where the judgment was affirmed. Still dissatisfied, they sued out the present writ of error, and removed the cause into this court.

Since the cause was entered here, the defendants have as-

signed three errors, as follows: 1. That the Circuit Court erred in holding that the concession under which the plaintiffs claim is a complete title. 2. That the Circuit Court erred in holding that the title derived under that concession, accompanied by the statutory confirmation referred to, is superior to that of the defendants as confirmed by the act of Congress of an earlier date, and the patent issued to the party. 3. That the Circuit Court erred in treating the question of boundary as one to be determined by the court and jury, though the uncontradicted evidence showed that the tract could not be located by the description given in the concession.

Applicants for a concession in Louisiana as well as in California usually addressed a petition to the governor for the land, and it seldom or never appears that any survey was had before the concession was issued. Surveys frequently followed the concession or grant; and where the proceeding is regular, it affords strong evidence to support the title of the claimant.

Regular concessions or grants were usually made in one of three ways: 1. Grants by specific boundaries, where, of course, the donee is entitled to the entire tract within the described monuments. 2. Concessions or grants by quantity, as of one or more leagues of land within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more, to be located by the public authority, usually in a manner to include the improvements of the occupant, and with due respect to any descriptive recitals in the instrument. 3. Grants or concessions of a place or rancho by some particular name, either with or without specific boundaries, where the donee is entitled to the tract known by the name specified according to the boundaries, if boundaries are given, and if not, then according to the known extent and limits of the tract or rancho as shown by the proofs, including evidence of possession and the settlement and cultivation of the occupant. *Higueras* v. *United States*, 5 Wall. 827–834.

Fee-simple title is claimed by the plaintiffs as purchasers from the heirs of the original donee to whom the concession was made, Nov. 21, 1710, by the authorized agents of the sovereign of the province as universally admitted. Full proof is also exhibited that the concession of the donee was confirmed

Sept. 15, 1713, by the governor of the province. Support to the theory that the concession is genuine and authentic is also derived from a document appended to it, showing that the widow of the donee, at a very early period, presented the same at the office of the council of the province, in order that it might be duly enrolled in the minutes of that tribunal.

Unimportant preliminary recitals in the concession will be omitted, as it is not controverted that it emanated from competent authority. It is addressed to the grantee, and purports to concede to him "the land of Grosse Pointe, to begin at and run along the course of Fowl River till it reaches the Oyster Pass which separates Massacre Island from the mainland." Enough appears to warrant the conclusion that the land was regarded as suitable for grazing, and the express declaration is that the entire cession and transfer were made in the name of his Majesty, "with its circumstances and dependencies," in order that the donee, his children, heirs, and assigns, may enjoy and use it for ever, without being troubled or disturbed in the peaceable possession thereof. 3 Am. State Papers, 20.

When the claim was first presented to the commissioners they described it as follows: The claim of the heirs of Nicholas Baudin to an island in Fowl River, being ten or twelve miles in length and from two to three miles wide, and they refer to the concession and the documents as the foundation of the claim.

Commissioners with fuller powers were subsequently appointed for the adjustment of land claims in the State where this tract is situated, and the plaintiffs gave in evidence their report upon the subject, entitled Special Report, No. 2, as follows: Claim of the heirs of Nicholas Baudin to an island in Fowl River, called Grosse Pointe, or Isle Mon Louis, estimated to contain about fourteen thousand three hundred and sixty arpens. 5 id. 130.

Extended report was made by those commissioners in favor of the claim, and it was declared valid pursuant to the first section of the act confirming the reports of the register and receiver of the land-office for the district therein described. 4 Stat. 358.

Proof of mesne conveyance to the plaintiffs was also introduced by them, and that the defendants were in possession of

the premises. Documentary evidence was also introduced by the defendants in support of their title, as heirs of Henry Francois, for which purpose they read the entries in the third volume of the State Papers relating to the claim, as contained in the report of the register of the local land-office. They then read in evidence the suplementary act of Congress providing for the confirmation of land titles in that State. 3 id. 707. Also an abstract of locations from the records of the local land-office by the register, which was made a part of the bill of exceptions, and a duplicate copy of the patent certificate, with proof that it was correctly copied from the original. Evidence was also introduced by the defendants to authenticate the record of the survey and tract which they claim, and the same was read to the jury. Oral testimony was also introduced by the defendants proving that the plat and field-notes of the survey and location were correct, and they also read in evidence the patent to them from the United States, a copy of which is attached to the transcript. Both sides examined witnesses, whose testimony is duly reported; but it is not deemed necessary to reproduce it, as it is fully reported in the transcript and in the report of the case when first tried in the court of original jurisdiction. Full report was then made of the evidence, and the same was sent up to the Supreme Court of the State.

Matters of fact are determined by the verdict of the jury; and inasmuch as the assignment of errors does not call in question any ruling of the court in admitting or excluding evidence, the re-examination of the record will be confined to the instructions of the court given to the jury, and the exceptions of the defendants to the rulings of the court in refusing the requests for instruction which they presented.

Exceptions of a general character to the entire charge of the court are not entitled to much favor, as they fail to inform the presiding justice what the matters are to which the objections apply, and frequently give rise to embarrassment in the appellate court for the same reason. Objections to the charge should be specifically pointed out before the jury retire, in order that the justice presiding may know what the supposed errors are, and have an opportunity to make any corrections that the cir-

cumstances may require, to enable the jury to determine the issue between the parties according to law and the evidence.

Six separate propositions were submitted by the court of original jurisdiction to the jury, in substance and effect as follows: —

1. That the concession under which the plaintiffs claim is a complete grant, and that it vested in the donee a perfect title to the tract therein described as being in Fowl River, ten or twelve miles in length, and from two to three miles wide, and called Grosse Pointe; that if the jury believe from the evidence that the land of Grosse Pointe and Mon Louis Island are the same land, having the same boundaries and description, then the grant to the donee conveyed to him a complete title to the whole of the island, subject to the right of eminent domain, and that it is protected by the treaty of cession.

2. That the grant to the donee being perfect and complete, the land covered by it continued to be private property, the title to which is complete, unaffected, and unimpaired by any of the subsequent changes in the sovereignty of the province.

3. That the title of the donee was complete when the jurisdiction was ceded to the United States, which is sufficient to show that neither the act of Congress referred to nor the patent could convey any title to the other donee.

4. That the right and title of the original donee were superior to the claim of the other donee, and that if the jury believed from the evidence that the land in controversy is embraced in that concession, and that the plaintiffs derived their title to the same from that donee, then they are entitled to recover in this action.

5. That hearsay and reputation among those who may be supposed to have been acquainted with the facts as handed down from one to another is competent evidence of pedigree and heirship to be submitted to the jury, who are the judges of its weight and sufficiency.

6. That the title to real property may be acquired by virtue of adverse possession and enjoyment, when taken under color of title and held in good faith openly, notoriously, and continuously; that if the jury believe from the evidence that the plaintiffs had such possession of the premises for ten years before

the entry of the defendants, then the plaintiffs are entitled to recover.

Exceptions were noted as having been taken to the charge of the court and to each and every part of it. Such an exception in the Circuit Court could not be regarded as sufficient; but inasmuch as the case was reviewed and the judgment affirmed in the Supreme Court of the State, we are inclined to re-examine the errors assigned.

Suppose the matters set forth in the concession as descriptive of its location, extent, and boundaries existed there, as it must be presumed they did, when the grant was made, no one, it is supposed, would deny that they would be sufficient to give validity to the title of the plaintiffs. Conceded or not, it must be so, as they show a compliance with two if not all of the modes in which such grants were made under the prior sovereigns of the province.

Grants made by Mexican governors, says Mr. Justice Field, were usually made in one of three ways: 1. Grants by specific boundaries, where the donee is entitled to the entire tract. 2. Grants by quantity, as of one or more leagues of land situated in a larger tract described by out-boundaries, where the donee is entitled only to the quantity specified. 3. Grants of a certain place or rancho by some particular name; which rule is well exemplified by the grant exhibited in the transcript as the grant of an island of a specified name in a particular river. *Alviso* v. *United States*, 8 Wall. 337–339.

Grant all that, and still it is insisted that the name of the tract is not remembered by the witnesses, and that such changes in the surroundings of the alleged locality have taken place that neither the locality of the concession nor its extent can be ascertained.

Two answers to that suggestion are made, both of which are entitled to great weight: 1. Whether the locality of the tract as described in the concession can be ascertained or not, presents a question of fact to be ascertained by a jury. Evidence in respect to that issue was introduced by both parties, which was properly submitted to the jury, whose verdict is not open to revision in this court. 2. Possession under claim of right and color of title was fully proved, and was plainly of a character to

warrant the jury to find that it was adverse, uninterrupted, continuous, open, and notorious for a period twice as long as was required by the rules of the common law to bar the writ of right.

Facts found by a jury under our system of jurisprudence can only be revised in one of two ways: 1. By a motion for a new trial in the court of original jurisdiction. 2. By writ of error in some appellate tribunal for the correction of errors. *Parsons* v. *Bedford*, 3 Pet. 433, 446.

Application for a new trial was made in the court below and was refused. Since then the cause has been removed here, where nothing is open to re-examination except the question of law presented in the assignment of errors.

Separate examination of the instructions given to the jury is not required, nor could it well be accomplished without extending the opinion to an unreasonable length. Suffice it to say in that regard that they have been read with care, and that the court is of the opinion that they are correct; from which it follows that if any error has intervened it was the fault of the jury and not of the court, which cannot be remedied here, as it can only be corrected by a motion for a new trial.

Requests for instructions were made by the defendants, which were refused, and they excepted to the rulings of the court in refusing to instruct the jury as requested.

Two propositions arising out of the facts in the case cannot well be controverted: 1. That if both titles depended exclusively for their validity upon the action of Congress, the defendants' must prevail, the rule being that he who first obtains the title and not he who first applied for it has the better right. *McCabe* v. *Worthington*, 16 How. 86. 2. That if the title of the original donee was complete when the province was ceded to the United States, it is the superior title and is protected by the treaty of cession; to which a third proposition may be added, — that inasmuch as Congress has confirmed the concession to the donee as one derived from a former sovereign of the province, its genuineness and authenticity are established.

Even grant that, and still it is contended by the defendants that the land claimed was never segregated from the public domain. Proof of possession for a century and a half would

seem to be a sufficient answer to that objection, but the claim of the plaintiffs does not rest solely nor even chiefly upon that ground. Instead of that, the evidence introduced tended strongly to show that Grosse Pointe was the appellation given to the land embraced in the island now called Mon Louis.

Time has doubtless made some change in the topography of the place, but the description of the tract as given in the concession is as follows: Beginning at and running along Fowl River till it reaches the Oyster Pass, which separates Massacre Island from the mainland. From the subsequent survey it appears that Fowl River separates the island of Mon Louis from the mainland, and that the other boundaries are the bay and the gulf.

Grosse Pointe, it seems, must have referred primarily to some point of land formed by the waters of the bay and gulf, such as Cedar Point or some other of less notoriety. Objects of the kind would naturally attract attention, and it appears that Grosse Pointe was not distant from Fowl River, which serves to explain that part of the description that describes the course after mentioning the initial point as running along the river from the Pointe to the Oyster Pass. Beyond doubt the Oyster Pass led into the gulf, as there is no other stream than the river whose waters border upon the island.

Nothing adverse to the authenticity of the concession can be inferred from its extent, as it was customary at that day to make large grants. Its situation as an island made it admirably adapted to the purpose of grazing, for which it was sought and conceded. Its claimants went into possession of the tract nearly a hundred years before the province came within our jurisdiction, and on every change of the sovereign they produced their title-papers and demanded a recognition of their rights.

Fifty years after the grant, the widow of the grantee presented the title-papers to the proper officer for registry, and it appears that they were properly recorded. Twenty years later, when another change of jurisdiction was about to be effected, another assertion of title was made, nor were they ever interrupted until the United States acquired the jurisdiction. Their title was complete when the ratifications of the treaty of cession

were exchanged, and of course their title is protected by the treaty.

Want of survey since the treaty is suggested; but the grant was of the island whose boundaries are the waters which surround it, and which separate it as effectually from the public domain as could the most accurate official survey ever made.

Priority of recognition is claimed in favor of the other donee; but the decisive answer to that suggestion is that the act of Congress making it reserves in terms the rights of others, and limits the operation of the act to the relinquishment of any claim of the United States to the land.

Most of these views are much strengthened by historical researches of the court below, as exhibited in the opinion of the State court given in support of the judgment brought here by the present writ of error. *Trenier* v. *Stewart*, 55 Ala. 458.

Without entering further into the details of the case, it must suffice to say that we are all of the opinion that there is no error in the record.

Judgment affirmed.

DUNCAN v. GEGAN.

1. The proceedings had in a cause are not vacated by its removal from a State court to the Circuit Court.
2. Where the relative priority of certain mortgages had been determined on appeal by the Supreme Court of the State, and on the return of the mandate to the court of original jurisdiction the fund derived from the judicial sale of the property covered by them was distributed pursuant to the judgment, — *Held*, that the Circuit Court, the cause having been thereto removed, properly ruled that the parties, as to the rights litigated and disposed of, were concluded by the judgment.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Elam Bowman executed, Feb. 2, 1855, a mortgage in favor of Stephen Duncan on Waver Tree plantation, consisting of three thousand four hundred acres of land in the parish of Tensas, La., his wife intervening in the act, and renouncing her rights of tacit mortgage in favor of Duncan. It was inscribed in the

recorder's office of that parish Feb. 3, 1855, and reinscribed Sept. 13, 1865.

Bowman executed, Jan. 10, 1861, another mortgage on one thousand nine hundred and twenty acres of that land in favor of Shaw, tutor of Gegan. It was inscribed on that day. Mrs. Bowman did not renounce in favor of this mortgage.

Mrs. Bowman obtained judgment, May 18, 1866, against her husband for $13,278.42 and interest, with recognition of her legal and tacit mortgage upon all of his property, to date and rank from the years 1840 and 1845, for $9,325, and from Jan. 1, 1862, for $3,953.25.

Duncan brought, Dec. 26, 1865, suit upon his mortgage notes in the District Court for that parish, and obtained judgment May 19, 1866, with recognition of his mortgage.

Duncan and Mrs. Bowman, on their respective judgments, took out executions, and caused the property to be seized and advertised for sale April 3, 1869.

On the day upon which the sales were to take place, Gegan, who had then attained his majority, brought suit, in that court, to determine the rank of the mortgages, making Duncan and Mrs. Bowman parties defendant. In his petition he alleged that by reason of Duncan's failure to reinscribe his mortgage within ten years from the time of its first inscription, it was entitled to rank only from the date of its second inscription, while Gegan's mortgage was entitled to rank from the date of its original inscription.

From the judgment, fixing the relative rank of the three mortgages, an appeal was taken to the Supreme Court. It was there held that by reason of Duncan's failure to reinscribe his mortgage within ten years, it ceased to be evidence against Mrs. Bowman of a mortgage upon her husband's property, and that the other mortgage took effect as if that of Duncan had never been executed. His mortgage was therefore postponed to those of Gegan and Mrs. Bowman.

After this mandate was filed in the court of the parish, Gegan and Mrs. Bowman sued out executions, and the property was sold Sept. 3, 1870. The proceeds were paid to Mrs. Bowman, although they were not sufficient to satisfy her mortgage, which the court had determined was entitled to priority.

Duncan filed his petition April 26, 1876, for the removal of the suit to the Circuit Court of the United States. On its removal, he filed his bill in equity against Mrs. Bowman, Gegan, and the purchaser at the sheriff's sale, alleging that Gegan's mortgage was second in rank to his, and Mrs. Bowman's mortgage inoperative, because her judgment against her husband was collusive, fraudulent, null, and void; that the sale made under her mortgage by the sheriff was also void, because the purchaser was the adopted daughter of Mrs. Bowman, and without means; and that the decree of the Supreme Court was void, because the mortgaged property was not under seizure when it was rendered. He prays that his rights under his mortgage be recognized and maintained against Bowman and wife, Gegan, and the purchaser at sheriff's sale; that the sale be set aside, and the property ordered to be sold to pay the debt secured by his mortgage.

The Circuit Court, considering that the validity and relative rank of the respective mortgages had been determined by the Supreme Court, that the property had been sold under the mortgages entitled to precedence, and that the fund arising from the sale was actually distributed and applied in the manner and order of priority required by the judgment of the Supreme Court, dismissed the bill. Duncan appealed here.

Mr. Robert Mott and *Mr. Thomas J. Semmes* for the appellant.

Mr. Henry B. Kelly and *Mr. Henry L. Lazarus* for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The transfer of the suit from the State court to the Circuit Court did not vacate what had been done in the State court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State court would have had if the suit had remained there. It takes the case up where the State court left it off.

Before the suit of *Gegan* v. *Bowman and Duncan* was

removed to the Circuit Court, the rank of the appellant's mortgage had been finally settled by the judgment of the Supreme Court of the State on appeal. That was no longer an open question between the parties to that litigation. All the court from which the removal was afterwards made could do was to distribute the proceeds of the sale of the property in accordance with the directions of the Supreme Court. It had no power whatever to change the order of priorities as settled by the appellate court.

The question of the right to make the transfer is not before us. Duncan, who caused the removal to be made, is the only party who complains of the decree below, and he cannot object here to what has been done below by his own procurement. We confess it is not easy to see how a party could swear to his belief, that from prejudice or local influence he could not obtain justice in the State court, when all that court had to do was to divide the proceeds of a sale by paying them out in a certain way, and as to which there was apparently no possible chance of dispute. But still it was so sworn, and the Circuit Court took jurisdiction against the motion of the opposite party. Of that no complaint is now made by the appellees.

It follows, then, that, whether the proceedings which were afterwards had in the Circuit Court at the instance of the appellant were part of the original suit removed from the State court, or a new and distinct suit begun in the Circuit Court by the appellant himself after the removal, the judgment of the Supreme Court of the State on the appeal in the original suit concludes him as to his rights thus litigated and disposed of. As it is apparent that the questions presented by the new pleadings in the Circuit Court are in all respects the same as those settled by the Supreme Court of the State, it follows that the Circuit Court was right in holding that the appellant was concluded by that decree.

Affirmed.

STONE v. MISSISSIPPI.

1. In 1867, the legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum in cash, an annual payment of a further sum, and a percentage of receipts from the sale of tickets. A provision of the Constitution adopted in 1868 declares that "the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." *Held*, 1. That this provision is not in conflict with sect. 10, art. 1, of the Constitution of the United States, which prohibits a State from "passing a law impairing the obligation of contracts." 2. That such a charter is in legal effect nothing more than a license to enjoy the privilege conferred for the time, and on the terms specified, subject to future legislative or constitutional control or withdrawal.
2. *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518) commented upon and explained.
3. The legislature cannot, by chartering a lottery company, defeat the will of the people of the State authoritatively expressed, in relation to the continuance of such business in their midst.

ERROR to the Supreme Court of the State of Mississippi.

The legislature of Mississippi passed an act, approved Feb. 16, 1867, entitled "An Act incorporating the Mississippi Agricultural and Manufacturing Aid Society." Its provisions, so far as they bear upon the questions involved, are as follows: —

"The corporation shall have power to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holders thereof to any articles that may be awarded to them, and the distribution of the awards shall be fairly made in public, after advertising, *by the casting of lots, or by lot, chance, or otherwise*, in such manner as shall be directed by the by-laws of said corporation; . . . and the said corporation shall have power to offer premiums or prizes in money, for the best essays on agriculture, manufactures, and education, written by a citizen of Mississippi, or to the most deserving works of art executed by citizens of Mississippi, or the most useful inventions in mechanics, science, or art, made by citizens of Mississippi."

Sect. 7 provides that the articles to be distributed or awarded may consist of lands, books, paintings, statues, antiques, scien-

tific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful.

Sect. 8 requires the corporation to pay, before the commencement of business, to the treasurer of the State, for the use of the University, the sum of $5,000, and to give bond and security for the annual payment of $1,000, together with one-half per cent on the amount of receipts derived from the sale of certificates.

Sect. 9 declares that any neglect or refusal to comply with the provisions of the act shall work a forfeiture of all the privileges granted, and subject any officer or agent failing to carry out its provisions or committing any fraud in selling tickets at drawing of lottery to indictment, the penalty being a "fine not less than $1,000, and imprisonment not less than six months."

Sect. 11 enacts that, as soon as the sum of $100,000 is subscribed, and the sum of $25,000 paid into the capital stock, the company shall go into operation under their charter and not before, and the act of incorporation shall continue and be in force for the space of twenty-five years from its passage, and that all laws and parts of laws in conflict with its provisions be repealed, and that the act shall take effect from and after its passage.

The Constitution of the State, adopted in convention May 15, 1868, and ratified by the people Dec. 1, 1869, declares that "the legislature shall never authorize any lottery; nor shall the sale of lottery-tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." The legislature passed an act, approved July 16, 1870, entitled "An Act enforcing the provisions of the Constitution of the State of Mississippi, prohibiting all kinds of lotteries within said State, and making it unlawful to conduct one in this State."

The Attorney-General of Mississippi filed, March 17, 1874, in the Circuit Court of Warren County in that State, an information in the nature of a *quo warranto*, against John B. Stone and others, alleging that, without authority or warrant of law, they were then, and for the preceding twelve months had been, carrying on a lottery or gift enterprise within said county and State under the name of "The Mississippi Agricultural, Educa-

tional, and Manufacturing Aid Society." The information alleges that said society obtained from the legislature a charter, but sets up the aforesaid constitutional provision and the act of July 16, 1870, and avers that the charter was thereby virtually and in effect repealed.

By their answer the respondents admit that they were carrying on a lottery enterprise under the name mentioned. They aver that in so doing they were exercising the rights, privileges, and franchises conferred by their charter, and that they have in all things complied with its provisions. They further aver that their rights and franchises were not impaired by the constitutional provision and legislative enactment aforesaid.

The State replied to the answer by admitting that the respondents had in every particular conformed to the provisions of their charter.

The court, holding that the act of incorporation had been abrogated and annulled by the Constitution of 1868 and the legislation of July 16, 1870, adjudged that the respondents be ousted of and from all the liberties and privileges, franchises and emoluments, exercised by them under and by virtue of the said act.

The judgment was, on error, affirmed by the Supreme Court, and Stone and others sued out this writ.

Mr. Philip Phillips for the plaintiffs in error.

Mr. A. M. Clayton and *Mr. Van H. Manning* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sect. 10. The doctrines of *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518), announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however,

it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case the question is whether the State of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit "the Mississippi Agricultural, Educational, and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to" "any lands, books, paintings, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful," "awarded to them" "by the casting of lots, or by lot, chance, or otherwise." There can be no dispute but that under this form of words the legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of $1,000 and "one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature cannot bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but

no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657; *Boyd* v. *Alabama*, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Company* v. *Massachusetts*, 97 id. 25; *Patterson* v. *Kentucky*, id. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen* v. *Virginia* (8 How. 163, 168), that "experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social

morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the provisional government of that State, in 1867, at the close of the late civil war, the present act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new constitution with a view to the resumption of their political rights as one of the United States, provided that "the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sect. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. Rev. Stat., sect. 3894; 19 Stat. 90, sect. 2.

The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Company* v. *Massachusetts*, *supra*.

In *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518), it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought

to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always

easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record.

Judgment affirmed.

UNITED STATES v. CLAMORGAN.

CLAMORGAN v. UNITED STATES.

1. The court reaffirms its rulings in *Scull* v. *United States* (96 U. S. 410) as to the nature of the title whereon a suit can, under sect. 11 of the act of June 30, 1860 (12 Stat. 85), be maintained against the United States for lands claimed under a grant from the French or the Spanish authorities in Louisiana.
2. The claim in this cause, founded upon an alleged grant made at St. Louis by Trudeau, lieutenant-governor, March 8, 1797, examined, and *held* not to be within the provisions of that section.

APPEALS from the District Court of the United States for the Eastern District of Missouri.

This was a suit for lands in Missouri, brought against the United States by parties claiming under James Clamorgan, who presented his petition, — which they filed as an exhibit, — dated at St. Louis, March 1, 1797, to Don Zenon Trudeau, Lieutenant-Governor of Upper Louisiana, praying there be granted to him on the western side of the river Mississippi, some leagues above the mouth of the Missouri, the tract of land bounded on one side by the little river called Lacharette, *alias* Dardenne, and on the other by the little river called Au Cuivre, — one on the south, the other on the north, will serve as boundaries to those two sides; also sixty arpens of land in front of the banks of the Mississippi, immediately adjoining the mouth of the first above-named river, Lacharette, in descending the current of the Mississippi; and again sixty arpens in front, also, on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above-named river, Au Cuivre, and ascending the current of the Mississippi. The depth of the three different above-described tracts of land to be extended by two lines starting from the banks of the Mississippi, one from the most southern and the other from the most northern point (of the front) of the above-demanded tracts, which two lines shall be run parallel on each side, in a westwardly direction, until they reach the top of the high hills in the rear; and from there the said two lines to be continued and prolonged in the same westwardly direction until they reach a point at the distance of about two hun-

dred arpens from the foot of said hills, and then those two extreme points shall be connected together by a straight line which shall be run so as to form the fourth side of the said three tracts here above demanded; the said lines encompassing in their extent all the waters of the above-mentioned rivers, Lacharette, *alias* Dardenne, and Au Cuivre, in order that hereafter the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital.

The plaintiffs also filed the following papers as exhibits: —

"Don Zenon Trudeau, captain in the regiment of Louisiana, lieutenant-colonel by brevet, and lieutenant-governor of the western part of Illinois:

"Cognizance being taken of the statement made by Don Santiago Clamorgan, and the governor-general, the Baron de Carondelet, having particularly recommended to me to facilitate and protect the discovery and commerce of Upper Missouri, in which the above-named Clamorgan has engaged at my entreaties, considering the losses which said enterprise has occasioned to him, and the new expenses to which he shall have to contribute on account of the same undertaking, and how important it is to favor and extend the discoveries herebefore mentioned, without prejudice to the royal treasury, and to the interest and welfare of these settlements, but, on the contrary, in contributing to their prosperity by drawing new inhabitants:

"For these considerations, and on account of the said Clamorgan having rendered himself worthy and deserving of the favors of the government, the surveyor of this jurisdiction (as soon as the occupations of his place will permit) shall survey in favor of the party interested the extent of land he solicits in the way and manner described in the foregoing document, which, together with the plat and certificate of survey, and of the boundaries which shall be set (to said land), will form the title of concession, which in due time he shall have to lay before the general government of the province, in order to get its approbation and record.

"ZENON TRUDEAU.

"ST. LOUIS, March 3, 1797."

"ST. LOUIS, July 3, 1797.

"Under date of April 5, of this current year, the governor-general, Baron de Carondelet, writes to me as follows: —

"'I have read your official note, dated 11th of last March, in which you state the motives which have induced you to grant to Mr. Clamorgan the tract of land situated between the two rivers Charette and Cuivre, both emptying into the Mississippi; also sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. Two parallel lines are to be drawn, running in the interior of the country until they reach at the distance of two hundred arpens beyond the foot of the first hills, conformably to the solicitation of the party interested.

"'All which I do approve, Clamorgan having deserved this favor from the government.'

"I transmit the same to you for your knowledge and government. May God have you in his keeping many years.

"ZENON TRUDEAU.

"S'or DON SANTIAGO CLAMORGAN."

Clamorgan filed, at St. Louis, June 27, 1808, notice of his claim before the recorder of land titles. He filed therewith the above evidence of title, and presented it to the board of land commissioners, Nov. 14, 1811. Upon it he claimed five hundred thousand arpens of land, situate on the rivers Mississippi, Dardenne, and Cuivre, district of St. Charles; sixty arpens front on Mississippi, Charette, and Dardenne, back to the hills about two hundred arpens, district of St. Charles; and sixty arpens of land front on the Mississippi, commencing above the mouth of the Cuivre, up the Mississippi and back to the hills. The board was of opinion that the claim ought not to be confirmed.

The claim was presented June 21, 1833, by the representatives of Clamorgan, to the board organized under the act of July 9, 1832, for the final adjustment of private land claims in Missouri. 4 Stat. 565. Testimony was taken, and the concession of Trudeau and his letter to Clamorgan produced. The members of the board, Sept. 26, 1835, recorded their unanimous opinion that the claim ought not to be confirmed.

The United States filed an answer to the bill in this suit denying its material allegations, and insisting as a bar to the relief claimed that the lands in question had not at the time of the cession of Louisiana been severed from the royal domain, the concession being only inchoate and the description of them

vague; and that the conditions of taking possession — viz. building mills, slaughter-houses, &c. — had never been performed by the claimant. It was admitted that the claimed lands had been sold or disposed of by the United States. The District Court, upon a final hearing, decreed that the concession by Trudeau, of March 3, 1797, to Clamorgan, ratified and confirmed April 5, 1797, by Governor-General Carondelet, was a title binding on the United States, and that the complainants were entitled to recover certificates for 94,136 acres, to be located upon public land subject to private entry.

From the decree the United States and the complainants appealed: the former assigning for error that the court below erred in not dismissing the bill; and the latter, that the decree should have been for 675,000 acres.

The remaining facts are stated in the opinion of the court.

The Solicitor-General, for the United States.

Mr. Willis Drummond, *Mr. William R. Walker*, and *Mr. J. L. Bradford*, *contra*.

MR. JUSTCE MILLER delivered the opinion of the court.

The decree was that Clamorgan and others recover of the United States certificates under the sixth section of the act of Congress of June 22, 1860 (12 Stat. 85), for 94,136 acres of land, to be located on any of the public lands of the United States subject to private entry, in lieu of the original concession by the Spanish authorities to James Clamorgan, their ancestor, all of the land embraced in that concession having been disposed of by the United States. That act having expired by its own terms, was revived by the act of June 10, 1872, and under it this suit was instituted against the United States in May, 1873. The statute in question was the subject of very full consideration at the last term in *Scull* v. *United States*, 98 U. S. 410. As we see no reason to modify the construction then given to it, we might, but for the very large amount involved, decide the present suit by a simple reference to that case as the foundation of our judgment.

The act of 1860 was the latest, as it was intended to be the end, of a series of statutes for the adjustment of land claims

within the territory ceded to the United States by France, but to portions of which there were private claims arising under the French and the Spanish governments, during the period of their respective proprietorship. These claims were in all stages of progress, from the merest permissive license to occupy, to the perfected grant of a tract identified by surveys and well-defined boundaries.

Immediately upon taking possession of the country, Congress legislated on the subject, and from that day to the act of June 10, 1872 (17 Stat. 378), the statute-books abound with laws to enable the claimants to establish their rights.

To that end several commissions were organized. As they expired by the terms of the law creating them, or by the time limited for prosecuting claims, they were renewed or others substituted. In most cases they were only empowered to hear testimony and report it to Congress, with an opinion in favor of or against each claim submitted. In other instances, the courts were vested with jurisdiction to hear and decide, and summary modes of procedure were authorized. In all this matter, Congress, whether acting directly upon the cases brought before it, or by statutes conferring authority on other tribunals to adjudicate them, acted with a sincere desire to do justice to those who, by the transfer of this large domain, were remitted to our government for the recognition of their rights. The treatment of these claimants has been governed by patience in hearing and rehearing, by extension of time for presenting claims, by affording repeated opportunities to establish them, and by that careful regard for every equitable consideration favorable to claimants, which merits the name of generosity rather than strict justice. It was in this spirit that, after all jurisdiction over the subject-matter had ceased to exist in any other tribunal, Congress passed the act of 1860, and renewed it for a short period in 1872.

But over half a century had passed since Congress first created a tribunal to hear these claims. The system of congressional surveys had been extended over the ceded territory, and in many instances the legal title to the claimed lands within its limits had passed by government sales and patents to innocent purchasers, who therefore held with that title the

superior equity. In liberality, however, towards these dilatory or unfortunate claimants, that act provided that, whenever a claim was established under it to lands so sold by the United States, the successful claimant might select an equal quantity from any public lands subject to private sale. The latter in many cases, indeed in far the greater number of them, vastly exceeded in value those to which the claim had originally attached.

While thus anxious to be both generous and just to this class of claimants, it may well be supposed, in view of the period which had elapsed during which they might have established their claims, and the opportunities which had been given them to do so, that Congress would impose such limitations on the exercise of the right here granted as would protect the government against false and fraudulent claims, supported by forged documents and perjured evidence, easily procured and difficult of detection and refutation, by reason of the great lapse of time and the death of those who were most cognizant of the transaction. We, accordingly, find that, with regard to the large body of these claims, Congress required that, after the evidence had been sifted by the registers and receivers, and reviewed by the Commissioner of the General Land-Office, the final confirmation of them should remain with that body. As we said, however, in *Scull* v. *United States* (*supra*), a much more limited and well-defined class of claims might, at the option of the claimants, be prosecuted in the District Court of the United States, whose territorial jurisdiction included the *locus in quo* of the lands. Over a suit thus brought, Congress retained no further control, and the judgment, subject to an appeal here, was made conclusive. The claimants in the present case have invoked this alternative, and they must fail on this appeal, if their case does not come within the class of which that court has jurisdiction, as defined in Congress.

There was excluded from confirmation under this act, either by the courts or the favorable report of the officers of the Land Department, any claim which had been theretofore presented for confirmation before any board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by

fraudulent or improper means, or which previous boards had already twice rejected on the merits.

But aside from this exclusion, the description of the class of cases in which the District Court has jurisdiction to decree confirmation is found in the eleventh section of the act, which is copied and construed in the opinion in that case.

We again epitomize that construction: —

1. The documents, surveys, possession, or other acts on which claimant relies must have been completed during the period of the actual possession of the government, prior to that of the United States, under which the claim is asserted.

2. The claimant, or those under whom he holds, must have been out of possession for twenty years or more before the suit is commenced.

3. The claim must be sustained under a complete grant or concession from such government; or order of survey duly executed; or by other mode of investiture of original title in the claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed, natural, or ascertainable boundaries, or initial points, courses, and distances, by competent authority, prior to the cession of such lands to the United States.

We also said in that case that the action under that statute is substantially an action of ejectment in which the United States consents to be a defendant and sued as if in possession and the bar of the Statute of Limitations removed.

In the case before us neither the claimants nor any of their predecessors in interest were ever in possession of the land. There was no survey of it under the former government, nor has any yet been made for the purpose of locating the grant. There has never been any separation of it from the public domain, nor any attempt to separate it.

Is there any such definition of fixed, natural, ascertainable, boundaries, with courses and distances, in the supposed concession as will identify the land so as to make this separation?

As we have already said, no attempt has been made to make an actual survey which would establish an answer to this question. A sufficient reason for this may be found in the following extract from the decree itself: —

"And the parties to the above suits having by stipulation and agreement of record referred to the court *six plans or maps representing different modes of locating* said concession, . . . and the quantities of land represented by said plans having now been determined and reported to the court by a sworn expert, . . . it is ordered and decreed that the plan marked 'I' truly represents the lands conceded to Jacques Clamorgan."

The quantity of land embraced in the largest of these plans is estimated by this expert at 1,810,240 acres, and in the one adopted by the court, at 94,136 acres; the former quantity being nearly twenty times as much as the latter. The expert testifies that the estimate is as accurate as can be made in the absence of an actual survey in the field. And yet the claimants who appeal to this court in order to get the largest of these amounts did not even attempt to make an actual survey of the concession, which, if they are correct, is occupied by a highly civilized and thickly settled population, and there is no difficulty in making such survey other than what is found in the descriptive language of the grant. It is reasonable to suppose that that difficulty was known to be insurmountable, and this is confirmed by the irreconcilable differences of the conjectural plats, on which the government is to be *calculated* out of land scrip worth over $2,000,000. That the selection of one of these plats, almost at hazard, is to be made the foundation of the judgment of the court is directly opposed to the construction which this court has given to the section of the act under which it exercises this jurisdiction.

But if we examine the description afforded by this supposed concession for ourselves, we must arrive at the same conclusion. The only description is that found in Clamorgan's petition asking Lieutenant-Governor Trudeau for the concession. The two rivers therein mentioned, and the points where they respectively enter the Mississippi, are known or ascertainable. So, also, it is clear there could be ascertained the points sixty arpens above the mouth of the one, and as many below the other. But the point mentioned as the top of the high hills in the rear, in a westerly direction, is not known, and cannot be ascertained from any evidence in this record.

It is also clear from the plats presented to us that any two lines drawn west or westerly from points on the Mississippi River, sixty arpens north and south of the mouths of the Lacharette and Au Cuivre, parallel to each other, would cross one or both of those rivers, and leave a large part of the land lying between them out of the survey. Nor is any attempt made to identify the high hills or two hundred arpens from the foot of said hills, where the line shall be drawn which is to close the survey by connecting the two lines first mentioned.

In short, without elaborating this matter as we did in Scull's case, it is apparent that when Clamorgan presented his petition, and undertook to describe the land which he sought to obtain, he had no knowledge of the ascending course of the two streams he mentioned, nor of the hills, if there were any, west of the Mississippi, nor of any thing else probably but the bottom lands adjoining that river.

If the survey which the Spanish manner of granting public lands required, and which the order of Lieutenant-Governor Trudeau required in this case, had been made, these mistakes would have been corrected, and the final concession from Governor Carondelet, who alone could make such a grant, would, either in that document or by reference to the executed survey, have given a sufficient description. In *Scull* v. *United States* there was an attempt to supply the want of an actual survey by what the royal surveyor called "a figurative plan," and on this Governor Carondelet issued the final grant.

But in the present case there was neither an actual survey, nor a figurative plan, nor a final concession. We have already shown that the description in the petition of the original claimant is not such as to enable any one to identify the land or make a definitive location of it.

That we do not attach more importance to this want of a sufficient description of land granted than Congress intended, may be seen by a reference to the third class of sect. 3 of the act, in which Congress directs the land-officers to include "all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, *uncertainty of location*, *vagueness of description*, or any other cause sufficient in their opinion to justify such rejec-

tion." Obviously, even before this board, which was only to report to Congress, uncertainty of location and vagueness of description were held to be sufficient grounds for their rejection of the claim. Much more is it a good ground in a judicial proceeding, under the limitations of the act which we have considered as binding the court.

Two other serious exceptions are taken to claimants' title to recover.

It is said that there was no completed grant made by the Spanish government; because Governor Carondelet, who alone could make such a grant, has not done so.

It is certainly open to grave doubt whether the extract from a letter of Carondelet to Trudeau, in which, among other things, he expresses his approval *of the motives* of Trudeau in making the order of survey in favor of Clamorgan, can be construed into an official act, which amounts to a grant, at a time when no survey had been made, nor any reason given for not making it.

So, also, the petition of the present claimants in the District Court in this suit shows that this claim was before different tribunals under the several acts on that subject, and was reported against in both instances, and that this was long ago.

Counsel for the government insist with much force of argument that the claim was thus "*twice rejected on its merits*," within the meaning of the statute under which we are now proceeding. But we do not think it necessary to examine either of these points critically, because we are satisfied that, on the first ground we have discussed, the case comes within *Scull* v. *United States*, and is not so well supported as that was in the matter on which it was decided.

This renders unnecessary the consideration of the appeal of the claimants.

The decree of the District Court will therefore be reversed, and the case remanded with directions to dismiss the petition on the merits; and it is

So ordered.

RAILROAD COMPANY v. ALABAMA.

1. *Railroad Company* v. *Tennessee* (*supra*, p. 337) cited and approved.
2. Where the statute of Alabama subjecting her to suit in her courts was in force at the time when a contract with her was made and a suit thereon brought, but their functions were essentially those of a board of audit, and the plaintiff had no means of enforcing the payment of a judgment or a decree in his favor, — *Held*, that the repeal of the statute deprives the court of jurisdiction to proceed, and is not in violation of the contract clause of the Constitution of the United States.

ERROR to the Supreme Court of the State of Alabama.

The Revised Code of Alabama contains the following provisions: —

"SECT. 2534. *State may be sued by citizens, or domestic corporations.* A citizen of this State, or a domestic corporation, may bring suit against the State of Alabama, in the circuit or chancery court of the county in which he resides, or in which such corporation is located, which must, in all respects, be governed by the same rules as suits between individuals.

"SECT. 2535. *Solicitor of circuit defends for the State.* The solicitor of the circuit in which the suit is pending must attend to the suit on the part of the State, and the governor may, if necessary, employ assistant counsel, and the judge of the court determine the compensation.

"SECT. 2536. *Comptroller to pay judgment, on certificate of the judge and clerk, after six months.* If judgment be rendered against the State, it is the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate must issue until six months after the recovery of judgment.

"SECT. 2571. *Summons left with governor when State is sued.* When the State of Alabama is a defendant, the summons must be executed by leaving a copy of the summons and complaint with the governor.

"SECT. 3323. *The State may bring suit in chancery and be defendant therein.* The State may sue and be sued, by a citizen of the State, or domestic corporation, in chancery, and the suit is governed by the same rules as suits between individuals. The solicitor

of the circuit in which the suit is pending must attend to the same on the part of the State, and the governor may employ assistant counsel, if he deem it necessary, and the Chancellor may determine the amount of compensation; and if unsuccessful, the State is liable for costs as individual suitors are. The direction of the executive of the State, in writing, is sufficient authority to the attorney for bringing such suit."

These provisions are substantially the same as those contained in the Revised Code of 1852, and were in force when the act of Feb. 18, 1860, was passed, loaning and appropriating what is known in her legislation as the three per cent fund.

The South and North Alabama Railroad Company, a corporation chartered by the laws of that State, brought a suit in chancery against her April 4, 1874, in the Chancery Court of Montgomery County. It claimed title to that fund under her contract and legislation, and prayed for an account. The State, by her law officer, appeared and answered. An amended bill was filed Dec. 21, 1874.

The following act was approved Dec. 18, 1874: —

"SECT. 1. Be it enacted by the General Assembly of Alabama, that sections numbered two thousand five hundred and thirty-four (2534), two thousand five hundred and thirty-six (2536), two thousand five hundred and seventy-one (2571), and three thousand three hundred and twenty-three (3323) of the Revised Code of Alabama be, and the same are, hereby repealed.

"SECT. 2. Be it further enacted, that all laws and parts of laws in conflict with the provisions of this act, or which make any provisions for bringing or conducting suits against this State, be, and the same are, hereby repealed."

The State, by her Attorney-General, moved the court, May 11, 1875, to dismiss the cause, on the ground that there was then no law authorizing suits to be brought against her, and that the suit could not be further maintained because the law which may have authorized its institution had been repealed.

The court sustained the motion and dismissed the suit at the costs of the complainant. The Supreme Court on appeal affirmed the order of dismissal, and the company sued out this writ.

The cause was argued by *Mr. Samuel F. Rice* and *Mr. Thomas G. Jones* for the plaintiff in error, and submitted on brief by *Mr. John T. Morgan* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case, like that of *Railroad Company* v. *Tennessee* (*supra*, p. 337), presents the question of the constitutionality of a law taking away the right to sue a State on its contracts. The Constitution and laws bearing on the question are much the same in Alabama as in Tennessee; but in Alabama it was provided "that if judgment should be rendered against the State, it was the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate could issue until six months after the recovery of the judgment." Code 1867, sect. 2536. It was also the duty of the treasurer to pay all warrants drawn on him by the comptroller under the authority of law (Code, sect. 422); but the Constitution, in force then and now, provided in express terms that no money should be drawn from the treasury but in consequence of appropriations made by law. Const., 1834 and 1870, art. 2, sect. 24.

The proceedings in this case were begun while these laws were in force; but before final hearing the laws were repealed, and thereupon, on motion of the State, the suit was dismissed for want of jurisdiction. The Supreme Court affirmed this decision; and the question is, therefore, directly presented by this writ of error, whether the repealing statute is valid and constitutional as against this plaintiff in error, so far as it affects the present cause of action, which accrued while the right to sue existed.

We are unable to see any substantial difference between this case and that of *Railroad Company* v. *Tennessee*, *supra*. Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the State may stop payment by withhold-

ing an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee; but both States may refuse to pay, that is, may refuse to make the necessary appropriation, and the courts are powerless to compel them to do so. In neither State has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away.

Judgment affirmed.

MR. JUSTICE SWAYNE dissented.

MR. JUSTICE STRONG took no part in deciding this case.

NOTE. — At a subsequent day of the term a petition for rehearing was filed.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We have examined with care the cases in Alabama referred to in the elaborate brief filed with this petition, and are unable to see that they decide more than that a judgment creditor is entitled to his warrant on the treasury for the amount of his recovery. No case has gone beyond this. The treasurer must pay the warrant when issued, if he has funds in his hands appropriated for that purpose; but if there has been no appropriation, he cannot any more pay a warrant issued on a judgment than one lawfully issued without a judgment. Take this case as an illustration. The demand made by the railroad company is an extraordinary one, and involves a large amount of money. Should a recovery be had, and the warrant paid without reference to the specific appropriations, which had been made by the legislature, of the funds in the treasury, it would almost of necessity embarrass the government in its daily operations. The constitutional provision referred to in our former opinion was, among other things, intended to meet just such a state of facts. Knowing what appropriations are made, the legislature provide the funds to meet them. If, from any cause, an unusual claim arises, the parties must wait for the payment until the legislature can provide the money. The case is precisely like that of a judgment in the Court of Claims against the United States. By the Constitution of the United States no "money shall be drawn from the treasury but in consequence of appropriations made by law." Art. 1, sect. 9. Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had.

Petition denied.

RAILROAD COMPANY v. TURRILL.

Where, in a suit alleging the infringement of the complainant's letters-patent, and praying an account of profits, a decree, passed in his favor for a certain sum, was on appeal affirmed here, with "interest until paid at the same rate per annum that *similar* decrees bear in the courts of the State," and that rate on money decrees is six per cent, — *Held*, that the decree so affirmed bears interest at that rate.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Enoch Totten and *Mr. George Payson* for the appellants.

The court declined hearing *Mr. Francis H. Kales* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

When this case was here before (94 U. S. 695), we affirmed the decree then appealed from "with costs and interest until paid at the same rate per annum that similar decrees bear in the courts of the State of Illinois." In this way we established the validity of the patent sued on, and directed the court below to proceed with the collection of its money decree, with such interest as similar decrees bear in the State. By "similar" we meant decrees for the payment of money, and not decrees in patent suits, for of such suits the State courts have no jurisdiction.

The courts of Illinois have uniformly held that money decrees carry interest at the rate of six per cent per annum, the statutory rate for judgments. For this reason it was right for the Circuit Court, when our mandate went down, to order that the decree affirmed be executed by the collection of the money found to be due, and interest, which, under the established rule in the State, will be at six per cent.

Decree affirmed.

HOWARD v. RAILWAY COMPANY.

Where judgments were rendered against a railway company in Wisconsin, and the assignee of the older one, in order to enforce his lien, filed his bill against another company, who, under claim of right, had obtained possession of the road, — *Held*, 1. That the junior judgment creditor was not a necessary party, although, before the bill was filed, he had put on record in the proper office the sheriff's deed conveying the road to him pursuant to a sale under an execution sued out upon his judgment. 2. That he could not maintain ejectment against the purchasers, under the decree directing the sale of the road to satisfy the older judgment.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This is an action of ejectment brought by Charles Howard against the Milwaukee and St. Paul Railway Company, to recover certain parcels of ground on which the defendant's railway and depots in the city of Milwaukee are situate. The La Crosse and Milwaukee Railroad Company constructed this end of its road in 1853–54, and erected its passenger and freight depots and its warehouses and road tracks in that city on the demanded premises. The latter have been in use since 1856 for railway purposes. Howard claims title under a deed executed June 13, 1862, by the sheriff to him as the purchaser for $7,500, at a sale which took place Jan. 15, 1859, under an execution sued out on a judgment for $25,586.78 against the latter company, and in favor of Sebre Howard, which was recovered and docketed in the Circuit Court of Milwaukee County, May 1, 1858. The deed was recorded Nov. 20, 1863, in the office of the register of deeds of that county.

The defendant also claims title under a judicial sale. A judgment was rendered Oct. 7, 1857, for $111,727.21 in favor of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company by the District Court of the United States for the Eastern District of Wisconsin. It was docketed on that day, and by several mesne assignments transferred to Frederick P. James.

That company executed its mortgage, dated June 21, 1858, and recorded July 8 of that year, to William Barnes, to secure

the bonds issued by it, amounting in the aggregate to $2,000,000. A supplemental mortgage was executed to him by way of further security. Default having been made, the mortgaged property, including that now in controversy, was, with all the franchises, rights, and privileges of the company, advertised for sale, and sold to Barnes, May 21, 1859. He purchased the same for $1,503,333.33, in trust for the bondholders, and they organized a new corporation, under the name of the Milwaukee and Minnesota Railroad Company, to which was transferred all the property and the rights and franchises acquired by the sale.

There was, however, a mortgage prior in date to both the judgments above mentioned. It was executed Aug. 17, 1857, by the La Crosse and Milwaukee Railroad Company to Bronson and Soutter to secure the payment of $1,000,000, and covered the entire road and property of the company from Milwaukee to Portage City. The mortgagees filed, Dec. 9, 1859, their bill of foreclosure against that company, the Milwaukee and Minnesota Railroad Company, the plaintiff in this suit, said Sebre Howard, and others, defendants. The court passed a decree for the sale of the property, providing, however, that if the last-named company should pay into court a certain sum of money for the complainants, possession should be delivered to it of the eastern division of the La Crosse and Milwaukee Railroad, being that portion of the road from Milwaukee to Portage, upon said company executing a bond to pay such sums of money as should come into the hands of the company to satisfy the Howard and Chamberlain judgments, if they should be established as liens upon the road. The company was let into possession of the road, and retained it until March 6, 1867. No sale was ever had under this decree.

James and other creditors of the La Crosse and Milwaukee Railroad Company filed their bill in the Circuit Court of the United States for the Eastern District of Wisconsin against that company, and the Milwaukee and Minnesota Railroad Company, praying that the sale to the latter company under the mortgage to Barnes be set aside as fraudulent and void. &c. This court, on appeal (6 Wall. 752), declared such sale to

be void, and pursuant to its mandate a decree was entered in the lower court enjoining that company from setting up any right or title to the property by virtue of its purchase under that mortgage. Said James filed his bill, April 18, 1866, in the court below against the Milwaukee and Minnesota Railroad Company to enforce the lien, and have execution of the said judgment, whereof he was the assignee, by a sale of the property, subject to certain liens and judgments thereon. A decree was passed declaring that the judgment was a lien upon the property, and fixing the amount due thereon; that the La Crosse and Milwaukee Railroad Company had ceased to exist as a corporation; and that the other company had succeeded to its property, subject to all valid and subsisting liens and incumbrances. The court further adjudged that all and singular the railroad formerly known as the La Crosse and Milwaukee Railroad, from Milwaukee to Portage City, its depots, station-houses, and buildings, together with all its rolling-stock, franchises, and appurtenances now in the possession of or claimed by the Milwaukee and Minnesota Railroad Company, be sold at public auction by the marshal of that district, unless prior to such sale said defendant pay to said complainant, or his solicitor, or to said marshal, the amount so as aforesaid adjudged due said complainant, with interest and costs up to the time of such payment; and that after such sale the company and all persons claiming or to claim from or under it be for ever barred and foreclosed of and from all equity of redemption and claim of, in, and to said railroad, rolling-stock, franchises, and appurtenances, and every part and parcel thereof.

The sale was made subject to said prior liens and incumbrances on the day prescribed by the decree, and was reported to and confirmed by the court. The marshal thereupon executed a deed to the defendant, purchaser at said sale. It has been ever since in possession of the premises.

Said Charles Howard was not a party to the said proceedings and decree.

There was verdict for the defendant, and judgment having been rendered thereon, Howard sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Mr. H. M. Finch for the plaintiff in error.
Mr. John W. Cary, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Possession of the lands in controversy was held by the defendants at the time laid in the declaration, as the road-bed, depot site, and other structures of their railroad, at the described locality, and the plaintiff brought ejectment to recover the premises, claiming title to the same by purchase at a sheriff's sale by virtue of a seizure to satisfy a judgment recovered in the name of Sebre Howard against the original company owning and operating the railroad and under which both parties claim title.

Sufficient appears to show that the company became indebted to the judgment creditor in the sum of $25,000, and gave him its promissory note for that amount. Payment being refused, he sued the same, and on May 1, 1858, recovered judgment for the amount. Execution in due form issued on the judgment, and the sheriff, by virtue thereof, seized and sold the property to the plaintiff, Jan. 15, 1859, as appears by the deed given in evidence.

Such a deed, it is claimed by the plaintiff, is by the law of the State made *prima facie* evidence that the title of the person against whom the judgment was rendered and by virtue of which the sale and deed purport to have been made in the lands and real estate described in the deed, passed to and vested in the grantee in such deed, and this without making other proof, either of the judgment or sale, than that furnished by the deed. Laws Wis. (1869), 39; *Ehle* v. *Brown*, 31 Wis. 405, 412.

Title to the lands in controversy is also claimed by the defendants through a purchase pursuant to a prior lien made by a creditor of the company, under whom they claim, at a sheriff's sale of a subsequent date, by virtue of an execution issued on a judgment docketed Oct. 7, 1857, and the lawful deed of the sheriff executed to the creditor in pursuance of such sale. Without entering into details, suffice it to say that the judgment was rendered against the company in that case for $111,727.71, together with the costs of suit, and the evi-

dence exhibited in the transcript shows that the title of the judgment in due form of law passed to the defendants by certain operative mesne assignments.

Suppose the law of the State to be such as is contended by the plaintiff, it is plain that it is as applicable to the purchase by the creditor under whom the defendants claim as to that under which plaintiff claims title.

Service was made, and the defendants appeared and filed an answer denying each and every allegation in the complaint or declaration. Preliminary matters being settled, the parties went to trial, and the verdict and judgment were in favor of the defendants. Exceptions were filed by the plaintiff, and he sued out the present writ of error and removed the cause into this court for re-examination.

Since the cause was entered here, the plaintiff has assigned errors pursuant to the rule making that requirement: 1. Five of the assignments call in question the rulings of the Circuit Court in admitting evidence offered by the defendants. 2. Then follows the sixth assignment of error, which calls in question the ruling of the court that the title of the lands in controversy is in the defendants, and that the verdict of the jury should be in their favor. 3. Thirty-three requests for instruction were presented by the plaintiff, and he calls in question the ruling of the court in refusing each one of those requests.

When the plaintiff made the purchase under which he claims title, there were subsisting liens upon the property prior in date to the judgment for the satisfaction of which the sale was made, to wit, a mortgage dated Aug. 17, 1857, executed by the original company to Bronson and Soutter to secure the payment of one million dollars, and a judgment in favor of Newcomb Cleveland, dated Oct. 7, 1857, for the amount before described, and which was docketed on the day it was rendered.

Bonds to the amount of two millions of dollars were issued by the company, and June 21st of the next year they executed a mortgage upon its railroad and property to William Barnes as trustee, to secure the payment of those securities, and on the 11th of the next month they executed a supplemental mort-

gage to the same party for the same purpose. Interest having fallen due, which was not paid, the mortgage was foreclosed by advertisement, and on the 21st of May of the next year all the property, franchises, and rights of the mortgagor were sold under the mortgage, and were bid off by the mortgagee in trust for the bondholders. By virtue of that sale the bondholders and the mortgagee became the owners of the property, franchises, and rights of the mortgagor, and they united two days later in organizing a corporation under the statutes of the State, which received the name of the Milwaukee and Minnesota Railroad Company, to which they transferred all the rights and interests they acquired by that purchase.

Enough appears to show that the Bronson and Soutter mortgage covered the line of the road from Milwaukee to Portage City, and it appears that the mortgagees, Dec. 9, 1859, filed a bill in the District Court for the district to foreclose that mortgage, in which they made both the old corporation and the new company, together with Sebre Howard and the plaintiff in the present action, parties defendants in the suit. Somewhat protracted litigation followed, but it will be sufficient to say that it culminated in a decree of sale, with an order that if the successor company should, before sale, pay into court certain sums of money they should be let into possession of the road, rolling-stock, and other property of the old company from Milwaukee to Portage City, subject to prior liens. Pursuant to that order the new company paid the specified sums into court, and on the same day took possession of the property, and managed and operated it from that time until the same was sold to the defendants.

Other judgment creditors of the old company, including Frederick P. James, on the 22d of April, 1863, filed a bill in the Circuit Court against the successor company, joining the old company and Selah Chamberlain as parties respondent in the suit. What the bill prayed was that the sale to the new company might be decreed fraudulent, and that the company should be enjoined from exercising any control over the property and franchises mentioned in the mortgage. Hearing was had, and the bill was dismissed in the Circuit Court; but, on appeal to the Supreme Court, the decree of the Circuit Court

was reversed, and the cause remanded for a decree in favor of the complainants.

It appears from the mandate that it was decreed that the foreclosure and sale of the mortgage be set aside and annulled as fraudulent, and that the new company was perpetually enjoined from setting up any right or title under it to the railroad and other property sold under the mortgage, and that the mortgage remain only as security for bonds issued under it in the hands of *bona fide* holders without notice. Besides that, an order of sale was contained in the decree, but no sale of the railroad or property was ever made under that decree.

James became the assignee of the judgment rendered Oct. 7, 1857, in favor of Cleveland, and on the 18th of April, 1866, he, the assignee, filed his bill in the Circuit Court against the successor company to enforce the lien of that judgment, and to have the property covered by the lien sold to pay the judgment debt. Among other things, he set out the judgment, the mortgage, and the organization of the new company, and alleged that the mortgage was fraudulent, and that the new company was holding the property in fraud of the creditors of the original company, and prayed that the property might be sold to satisfy the judgment, subject to certain prior liens and incumbrances.

Due process was served, and the respondent appeared and filed an answer. Litigation followed, which resulted in a decree that there was due to the complainant, as such assignee, $98,801.51, and that the same was a lien and incumbrance as of the date of Oct. 7, 1857, upon all the right, title, and interest which the original company had in and to the property situated between Milwaukee and Portage City. Provision was also made in the decree for the sale of all that portion of the railroad, the same being then in the possession of the successor company, and that that company and all persons claiming under it be barred from all equity of redemption. Explicit recitals were contained in the decree that the original company had ceased to exist as a corporation, and that the new company had succeeded to its property, subject to subsisting liens and incumbrances.

On the 2d of March, 1867, pursuant to that decree a sale

was made of the property by the marshal to the defendants for the sum specified in the transcript, and three days later the sale was confirmed by the Circuit Court, when the defendants received their deed of the premises, duly executed by the marshal. Demand of possession was made by the purchasers on the following day, which was duly surrendered by the occupants, and the defendants have continued to operate the road to the present time.

Separate exception was taken to the introduction of each of the documents offered by the defendants to prove the facts set forth in the preceding statement, and those exceptions constitute the basis of the first five assignments of error. Without entering into details, suffice it to say in that regard that the court is of the opinion that those assignments of error must be overruled, as it is clear that the entire evidence to which they relate was admissible either to show the title of the defendants, or to explain the changes made in the name of the corporation, or the regularity of the judgments, or the creation of the liens, or the transfers of the titles, or regularity of the proceedings by which the title was acquired or transmitted from one party to another.

Suppose that is so, still it is insisted by the plaintiff that the Circuit Court erred in directing the jury to return a verdict for the defendants, as specified in the sixth assignment of error.

None of the facts were in dispute, nor was there any conflict of testimony. Nothing of the kind is pretended, as all the material facts were exhibited in the documents given in evidence, consisting of judicial proceedings, mesne conveyances, judicial sales, and written assignments or conveyances, leaving nothing as an issue of fact to be determined by the jury.

Judges are forbidden to submit a question to the jury where there is no evidence to sustain the theory of the party making the request, nor are they any longer required to do so even when there is some evidence to support the theory, unless the evidence is of such a character that it would warrant the jury in finding a verdict in favor of the party presenting the request. *Improvement Company* v. *Munson*, 14 Wall. 442, 448; *Ryder* v. *Wombwell*, Law Rep. 4 Ex. 32.

Both parties set up a lien as the foundation of their title,

and it is undeniable that the judgment upon which the defendants rest their claim of title was rendered and docketed so as to become a lien upon the premises in controversy more than six months earlier than that which constitutes the basis of the title claimed by the plaintiff. Nor can it benefit the plaintiff in this litigation that he first took the necessary steps to enforce his lien, unless he can show that by some means the prior lien of the defendants has been displaced or has become inoperative, which is not pretended. Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage. Either may proceed in the case of mortgage, where the condition is broken, to foreclose; but if the second mortgagee proceeds first, his decree of foreclosure does not supersede or impair the rights of the first mortgagee, nor did the proceedings of the plaintiff to enforce the lien of his judgment have any effect whatever to supersede or displace the prior lien under which the defendants claim.

Concede that the judgment under which the defendants claim is prior in time and legal effect, still it is suggested by the plaintiff that it should have been enforced by seizure and sale instead of by a proceeding in equity.

Pending that litigation the decree declaring the lien was appealed to this court, and this court, Mr. Justice Nelson giving the opinion, decided that judgments, by the law of the State, are liens on real estate, and that the judgment, being the one now in question, became a lien on the road from the time of its rendition, and that a sale under a decree in chancery and a conveyance in pursuance thereof, confirmed by the court, passed the whole of the interest of the company, existing at the time of its rendition, to the purchaser. *Railroad Company v. James*, 6 Wall. 750.

Weighed in view of that decision, it is clear that the suggestion of the plaintiff cannot be adopted.

Failing in that, his next suggestion is that he is not bound by the decree, inasmuch as he was not made a party to the suit which resulted in the decree, to which several answers may be given: 1. That he was not a necessary party, even if within the jurisdiction. 2. That he was not within the jurisdiction, and did not ask to be made a party. 3. That the decree in the

case, being a decree in equity, did not supersede or displace his lien. 4. That the decree left him still the right, as second lienholder, to redeem, which he may still do if his right is not lost by laches or lapse of time.

Much discussion of the mortgage to the trustee to secure the two millions of bonds is unnecessary, as it was subsequent in date to the judgment of the plaintiff. Nor is it necessary to add to what has already been remarked in respect to the foreclosure of the mortgage, as it left the judgment under which the sale to the plaintiff was enforced wholly unaffected as to priority and as to any rights accruing from priority. Evidence in that regard was not material to aid the alleged title of the defendants in any respect, except to show the origin of the new company and the transfer of the property from the old company to its successor.

Regular proceedings to foreclose the one million mortgage was also instituted; but there was no sale under that decree, the only result affected by it being to vest in the new company the possession of the railroad and its appurtenances. By paying the amount ascertained as allowed by the court, the new company acquired both the right of possession and the actual possession of the mortgaged property, and to that extent at least it stepped into the place of the old company as mortgagor, and became by the decision of the court the owner of the equity of redemption.

Beyond doubt such was the *prima facie* effect of the proceeding, but the possession and interest acquired by the new company were during all the time subordinate and subject to subsisting prior liens and incumbrances, among which was the judgment of the plaintiff as enforced by the prior sale. Prior liens and incumbrances were not affected by that proceeding, nor is it of much materiality in the present controversy, except to show the relation which the new company bears to the railroad and property in question.

Questions of various kind arise in the case, but the main question throughout is who holds the paramount legal title to the property which the plaintiff seeks to recover by his action of ejectment; and in determining that question it is evident that the controlling inquiry is who has the prior lien, as it is

clear that the sale of the property by one having only a subsequent lien will not supersede or displace a prior lien held by another; and it is equally clear that a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his rights in proper season. Such propositions cannot be successfully controverted; but the plaintiff contends that inasmuch as the new company was enjoined from asserting any right or title to the property on account of the fraudulent character of the proceeding, and inasmuch as the plaintiff was not a party to the proceeding to enforce the prior judgment against the old company, that the defendants did not acquire any superior legal rights by the sale under that decree.

Other suggestions of various kinds are made to show that the sale under that decree is ineffectual to give effect to the lien secured by the judgment; but the principal one is that the plaintiff was not made a party to the proceeding, and has not had his day in court, in opposition to the final decision which ordered the sale. Mere equities are not involved in the controversy, but the court is required to deal with the strict legal rights of the parties.

Frequent reference is made in argument to the fact that the proceeding for the foreclosure of the larger mortgage was subsequently adjudged fraudulent, and to the injunction which followed; but it is nevertheless true that the new company was duly organized, and that its actual existence as a corporation has been recognized in repeated instances by the courts in litigations of great importance. It was recognized as such in the proceeding to foreclose the smaller mortgage, and in the decree or order of the court in letting the new company as such into the possession of the railroad and its property, and throughout the period, exceeding fourteen months, that its directors and agents possessed, controlled, managed, and operated the railroad and all its fixtures and appurtenances. Public acts of the kind cannot be overlooked, and it was recognized in the proceeding to enforce the lien of the judgment under which the defendants claim title, both by the Circuit Court and the Supreme Court in three appeals here, as evidenced by the reported decisions of this court. *Railroad Companies* v. *Chamberlain*,

6 Wall. 748; *Railroad Company* v. *James*, id. 750; *James et al.* v. *Railroad Company*, id. 752.

Judicial recognitions of the kind are repugnant to the theory of the plaintiff, to which it may be added that it was the new company that was in possession of the property when the proceeding was commenced to enforce the lien of the judgment under which the defendants claim title, and they were still in actual possession of the same when the first decree was entered.

Complaint is made by the plaintiff that he was not made a party to the proceeding, but the omission to make him a party did not displace any lien he had upon the property, nor did it give him any new or enlarged interest in the same. Coming to the question of priority of legal title, the court must look at the judgments from which the respective titles flow. In settling legal rights, the court must give the party superiority whose lien was first acquired and perfected by an appropriate proceeding.

By omitting to make the plaintiff a party to the equity proceeding to enforce their lien, the defendants did not deprive the plaintiff of any legal right, nor was he cut off from any equitable rights which under the law had accrued to him in his position as a subsequent judgment creditor. Had the plaintiff been in possession of the premises when the decree was rendered and when the sale was made, he could not have been dispossessed by any process issued in the equity suit; the rule being that the writ of assistance cannot go against a stranger in a suit for foreclosure, and that the remedy of the party in such a case is ejectment.

Grant all that, and still it is suggested that the plaintiff lost his right to redeem which he could have exercised if the sale had been made at law; but it is not admitted that the suggestion as to loss of remedy is well founded, as it is clear that he might have had a remedy in equity after the sale as well as before. Equity in such a case is a convenient remedy, and it is obvious that the plaintiff could have filed his bill, and if there had been no other difficulty than priority of lien the court of equity would have granted him the right to redeem.

Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree; nor is that

rule violated in the least degree when it is held that the title of the defendants is paramount, as that consequence flows from the fact that the lien of the judgment under which the defendants claim is prior to that under which the plaintiff claims his title. Whatever rights the plaintiff had prior to the sale in equity which gives the defendants the paramount title, he still has, wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches.

Process against the plaintiff under that decree could not affect his rights, as he was not a party to the proceeding, consequently the lien of his judgment still remained in full force. Even if the plaintiff had been made a party to that proceeding, the only effect would have been to cut off his equity of redemption, and as he was not made a party, his equity of redemption is not extinguished.

Authorities are scarcely needed to support these propositions, it being universally admitted that writs of assistance can only issue against parties affected by the decree, which is only saying that the execution cannot exceed the decree which it enforces, the rule being that the owner of property mortgaged which is directed to be sold can only be barred when he has had notice of the proceedings for its sale, if he acquired his interest prior to their institution. *Terrell* v. *Allison*, 21 Wall. 289, 292.

Everybody admits the correctness of that rule; but it by no means follows that the decree of sale in equity is void because a second incumbrancer is not made a party to the proceeding, as it is clear that his lien remains in full force notwithstanding the decree of sale entered pursuant to such a proceeding.

Tested by these considerations, it follows that the sixth assignment of error must be overruled.

Most of the material matters involved in the seventh assignment of errors have already been sufficiently examined. Many of the assignments of error under this number aimed to show that the Circuit Court erred in refusing to adopt the theory of the plaintiff, that certain portions of the premises in controversy occupied by the defendants for railroad tracks or as sites for their depot and other structures are not necessary for the purposes suggested, or that the title to the same did not pass

to the defendants. Careful efforts to examine these matters to the extent of the means exhibited in the transcript have been made, and it must suffice to say in that regard that the court is unable to perceive that it is shown that the Circuit Court erred materially in any of those matters to the prejudice of the plaintiff.

Remarks already made cover all the other grounds of complaint, and are sufficient to show that there is no error in the record.

Judgment affirmed.

INDEX.

ADMIRALTY.

The act of Congress approved March 2, 1853, entitled "An Act to establish the territorial government of Washington" (10 Stat. 172), enacts that the district courts of the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the Territory. *Held*, that the district courts of the Territory have jurisdiction in admiralty cases. *The "City of Panama,"* 453.

ADMISSIONS. See *Equity*, 2.

ALABAMA. See *Constitutional Law*, 14.

AMENDMENT. See *Practice*, 5, 12, 14, 15.

APPEAL. See *Practice*, 21; *Supersedeas.*

1. Where bidders, at the public auction for the stalls in the Washington Market, filed their bill to enjoin the company from selling them upon the expiration of the terms for which they had been leased, the value of the right to sell, which the company claimed and the court below denied, determines the jurisdiction here. Where, therefore, a sale which would have produced more than $2,500 was enjoined by the Supreme Court of the District of Columbia, the company is entitled to an appeal, under the act of Feb. 25, 1879, 20 Stat. 320. *Market Company* v. *Hoffman*, 112.
2. An appeal will not be dismissed upon the ground that the decree from which it was taken was rendered by consent; but no errors will be considered here which were in law waived by such consent. *Pacific Railroad* v. *Ketchum*, 289.
3. A recital in the decree that it was assented to by the solicitor of one of the parties is equivalent to a direct finding that he had authority to do what he did, and, so far as the question is one of fact only, is binding upon this court on appeal. *Id.*
4. For the purpose of an appeal, this court need not inquire when the Circuit Court first obtained jurisdiction of the suit. It is sufficient

APPEAL (*continued*).
if that court had jurisdiction when the decree appealed from was rendered. *Id.*

ASSETS. See *Equity*, 2; *Executor.*

ASSIGNEE IN BANKRUPTCY. See *Mortgage*, 4, 5; *Practice*, 16; *Wife, Voluntary Settlement upon*, 4–6

ASSIGNMENT. See *Bankruptcy; Contracts*, 2; *Non-negotiable Demands.*
Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person, whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation, binding upon the parties and all who, having notice, subsequently claim under the debtor an interest in the fund. *Ketchum* v. *St. Louis*, 306.

ATTACHMENT. See *Lis Pendens*, 3.

ATTACHMENT BOND.
1. The fact that the amount of an attachment bond was fixed by an order of a judge makes no difference in Louisiana as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings. *Fleitas* v. *Cochrem*, 301.
2. This court conforms to the ruling of the Supreme Court of Louisiana, that the Code of Practice requires an attachment bond to be in "a sum exceeding by one-half" the claim of the creditor. *Id.*

ATTORNEY. See *Contracts*, 3; *Judicial Sale.*
An attorney employed by both parties to an agreement for the purchase of land for the sum of $8,000, upon discovering a defect in the title, concealed the fact from one of the parties, and in accordance with a secret agreement with the other procured a conveyance by quitclaim for the sum of $25 to E., his own brother. *Held*, that his conduct was a gross breach of professional duty, and that E. should be decreed on receiving the purchase-money, $25, to convey to the injured party the premises with covenant against the title of E. and all others claiming under him. *Baker* v. *Humphrey*, 494.

BANKRUPTCY. See *Wife, Voluntary Settlement upon*, 1, 5, 6.
1. On the 23d of February, 1875, certain creditors filed their petition in the District Court of the United States, praying that A. should be declared a bankrupt. On the 9th of March he appeared, and leave was given them to amend their petition by adding new causes of bankruptcy or otherwise. On the 16th of April, he filed his answer, denying that the aggregate of the claims of the petitioners amounted to one-third of the debts provable against him. Time was thereupon allowed for other creditors to unite with the petitioners, and the previous leave to amend the petition was continued. On the 22d of that month one B. was permitted to unite with the petitioning creditors, and their petition was amended by alleging that A., within six months before the petition was filed, committed, by the

BANKRUPTCY (*continued*).

non-payment of his commercial paper, an act of bankruptcy. The amount of A.'s debts then represented was sufficient, and upon the alleged act of bankruptcy set forth in the amended petition A. was duly declared a bankrupt. On the 12th of July, 1875, an assignment was made to C. as assignee, which included all the property and effects of every kind in which A. "was interested or entitled to have" on the 23d of February, 1875. C. filed, July 7, 1877, his bill to reach certain securities which had been transferred by A. on or about March 20, 1875. *Held*, 1. That the continuity of the proceedings in bankruptcy was unbroken, and that the assignment was operative, according to its terms, although the act upon which the adjudication was had was first alleged in said amendment to the petition. 2. That C.'s suit was not barred by the Statute of Limitations. *Bank* v. *Sherman*, 403.

2. The bankrupt law does not prohibit an insolvent debtor from dealing with or exchanging his property before proceedings in bankruptcy are instituted against him, provided there be no purpose to defraud or delay his creditors, or to give a preference to any one, and the value of his estate is not thereby impaired. *Stewart* v. *Platt*, 731.

BEQUEST. See *Charitable Bequests.*

BILL OF EXCEPTIONS. See *Exceptions, Bill of.*

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *National Banks.*

1. The defences of the maker of a promissory note can be cut off only by the payee's indorsement of it before maturity. *Trust Company* v. *National Bank*, 68.
2. A guaranty written upon it by the payee is not such an indorsement. *Id.*

BILLS OF LADING. See *Lading, Bills of.*

BOND, ACTION ON. See *Evidence*, 3.

BONDS. See *Attachment Bond; Lien*, 2, 3, 9, 10; *Municipal Bonds.*

BURDEN OF PROOF. See *Fire, Destruction of Buildings to prevent Spread of.*

CANAL AND DITCH OWNERS.

A., a water and mining company, constructed in 1853, over public land in California, a canal, and its right, which it has ever since exercised, to use the water for mining, agricultural, and other purposes, has been uniformly recognized by the local customs, laws, and the decisions of the courts of that State. B. is now the owner of lands through which the canal runs. He acquired title to one portion of them by a pre-emption settlement made after the passage of the act of July 26, 1866 (14 Stat. 251), and to another portion under the grant made to the Central Pacific Railroad Company, by the amended Pacific Railroad Act of July 2, 1864 (13 Stat. 356). In his suit against A., B. seeks the recovery of damages, and also prays

CANAL AND DITCH OWNERS (*continued*).

that the canal may be declared a nuisance, and as such abated. *Held*, 1. That B.'s title under the pre-emption laws is subject to A.'s right of way under said act of 1866. 2. That said act expressly confirmed to the owners of such canals a pre-existing right, which the government had by its policy theretofore recognized. A. had, therefore, within the meaning of said act of 1864, a "lawful claim" to the continued use of the water, which was not defeated or impaired by the grant of the lands to said railroad company. *Broder* v. *Water Company*, 274.

CAPITAL STOCK, SUBSCRIPTIONS TO. See *Municipal Bonds*, 1, 13–15.

CAPTURE. See *Prize*.

CASHIER, ACTS OF.

The Freedman's Savings and Trust Company, chartered by an act of Congress approved March 3, 1865 (13 Stat. 510), being, during a financial crisis, pressed for means, its agent, with the knowledge and consent of its trustees, borrowed of A. moneys which were applied to its use. A note therefor was signed by the actuary of the institution, who subsequently transferred to A., in satisfaction thereof, certain securities belonging to the company. That officer was held out to the public as competent to make such an exchange, and there was no departure in this instance from the established usage. No fraud was committed, and the transaction was advantageous to the institution. On the failure of the company, the commissioners appointed to wind up its affairs filed their bill, praying that A. be decreed to deliver to them said securities. *Held*, that the commissioners are not entitled to relief. *Cresswell* v. *Lanahan*, 547.

CAUSES, REMOVAL OF. See *Jurisdiction*, 1, 2, 5; *Practice*, 5.

1. A party is not entitled to the removal of a suit from a State court into the Circuit Court on account of prejudice or local influence, unless the adverse party is a citizen of the State in which the suit was brought. *Bible Society* v. *Grove*, 610.
2. A suit tried in a State court April 14, 1875, was, on the disagreement of the jury, continued at that term and the following one. *Held* that a petition for its removal filed thereafter should not be granted *Id.*
3. The proceedings had in a cause are not vacated by its removal from a State court to the Circuit Court. *Duncan* v. *Gegan*, 810.
4. Where the relative priority of certain mortgages had been determined on appeal by the Supreme Court of the State, and on the return of the mandate to the court of original jurisdiction, the fund derived from the judicial sale of the property covered by them was distributed pursuant to the judgment, — *Held*, that the Circuit Court, the cause having been thereto removed, properly ruled that the parties, as to the rights litigated and disposed of, were concluded by the judgment. *Id.*

CAUSES, SUBMISSION OF. See *Practice.*

CHARITABLE BEQUEST.

1. In Virginia, since her repeal of the statute of 43d Elizabeth, c. 4, charitable bequests stand upon the same footing as other bequests, and her courts of chancery have no jurisdiction to uphold a charity where the objects are indefinite and uncertain. Such being the settled doctrine of her court of last resort, this court accepts and enforces it in passing upon an attempted testamentary disposition of property which is claimed under the law of the State to be a valid gift for charitable uses. *Kain* v. *Gibboney*, 362.
2. A., who resided and died in Virginia, by her last will and testament, bearing date Dec. 9, 1854, and admitted to probate in 1861, bequeathed her property and money to B., "Roman Catholic bishop of Wheeling, Virginia, or his successor in said dignity, who is hereby constituted a trustee for the benefit of the community" (an unincorporated association previously described as a religious community attached to the Roman Catholic Church), the same "to be expended by the said trustee for the use and benefit of said community." *Held*, 1. That the bequest, conceding it to be for charitable uses, is invalid. 2. That the legislation of Virginia touching devises or bequests for the establishment or endowment of unincorporated schools or validating *conveyances* for the use and benefit of any religious society, does not apply to this bequest. *Id.*

CHARTER. See *Constitutional Law*, 10–12; *Contracts*, 9–11; *Corporations*, 1, 3; *Railroads.*

CHARTER-PARTY.

1. A., the owner of certain barges, executed charter-parties of them to the United States for a stipulated sum per month so long as they should be retained in the service. After they had been for some time used, he was informed by the Quartermaster-General that he must execute a new charter-party specifying a reduced compensation. A. declined to comply, and made a demand for them, which was refused. On learning the intention of that officer to retain possession of them and withhold all compensation, A. executed the required charter-party, stating at the time that he did so under protest and by reason of the pressure of financial necessity. He thereafter, from time to time, received, without protest or objection, payment according to the diminished rate, and then brought suit against the United States for the difference between it and the original rate, upon the ground that the last charter-party was executed under such circumstances as amounted in law to duress. *Held*, that A. is not entitled to recover. *Silliman* v. *United States*, 465.
2. A charter-party for the voyage of a vessel from New Orleans to certain designated ports contains a recital that said vessel is "now lying in the harbor of New Orleans," while in point of fact she was then at sea. In an action by the master of the vessel upon the charter-

CHARTER-PARTY (*continued*).

party, the jury was instructed that if the defendants knew at the time of executing it that the vessel was at sea, the words "now lying in the harbor" being merely a representation, should be regarded as of no significance. *Held*, that there was no error in the instruction. *Lovell* v. *Davis*, 541.

3. The charter-party fixed no definite time for the vessel to be at New Orleans ready to receive her cargo. *Held*, that if the master used reasonable diligence in bringing her to that port, the defendants were bound by the contract. *Id.*

CHATTEL MORTGAGE. See *Mortgage*, 3, 4.

CIRCULATING MEDIUM. See *Taxation.*

CLAIMS AGAINST THE UNITED STATES. See *Contracts*, 3; *Court of Claims.*

1. A party claiming a credit, which by reason of his laches was not presented to the accounting officers of the treasury, and disallowed in whole or in part by them, cannot set it up in an action brought by the United States against him for the recovery of a debt. *Railroad Company* v. *United States*, 543.

2. Where, by the terms of a decree rendered in its favor against a railway company, the United States was entitled to an execution thereon for a certain sum of money, and B., another company, the successor of A. and representative of its interests and assets, by petition prayed that an alleged indebtedness of the United States to B., contracted since the rendition of the decree, be applied in payment of that sum, — *Held*, that inasmuch as the claim of B. does not arise out of the decree, and the United States is not liable to suit thereon, except in the Court of Claims, B. is not entitled to the relief prayed for. *Railway Company* v. *United States*, 639.

COLLATERAL SECURITY. See *Contracts*, 2.

COLLECTOR OF CUSTOMS. See *Customs, Collector of.*

COMITY. See *Corporations.*

COMMERCE. See *Trade*, 1.

COMMERCIAL TERMS. See *Customs Duties*, 3–5.

COMMISSIONER OF CUSTOMS, MONEYS PAID INTO THE TREASURY PURSUANT TO ORDERS OF. See *Customs, Collector of.*

COMMISSIONER OF PATENTS, DECISIONS OF. See *Letters-patent*, 6.

CONDITION PRECEDENT. See *Internal Revenue, Collector of*, 2; *Municipal Bonds*, 13, 14.

CONGRESS. See *Constitutional Law*, 6; *Court of Claims*, 3.

CONNECTICUT. See *Corporations, Individual Liability of Officers thereof.*

CONSENT DECREE. See *Appeal*, 3; *Practice*, 7.

CONSTITUTIONAL LAW. See *Contracts*, 9–11; *Illinois; Municipal Bonds*, 16, 17; *Taxation*, 5; *Territory, Organization of a*

1. Sect. 3413 of the Revised Statutes, which enacts that "every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them," is not unconstitutional. *National Bank* v. *United States*, 1.
2. The provision in the first section of the Fourteenth Amendment to the Constitution of the United States, which prohibits a State from denying to any person the equal protection of the laws, contemplates the protection of persons, and classes of persons, against unjust discriminations by a State; it does not relate to territorial or municipal arrangements made for different portions of a State. *Missouri* v. *Lewis*, 22.
3. A State is not therefore prohibited from prescribing the jurisdiction of its several courts, either as to their territorial limits, or the subject-matter, amount, or finality of their respective judgments or decrees. *Id.*
4. Each State has full power to make for municipal purposes political subdivisions of its territory, and regulate their local government, including the constitution of courts, and the extent of their jurisdiction. *Id.*
5. A State may establish one system of law in one portion of its territory, and another system in another, provided always that it neither encroaches upon the proper jurisdiction of the United States, nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district. *Id.*
6. Subject to the limitations expressly or by implication imposed by the Constitution, Congress has full and complete authority over a Territory, and may directly legislate for the government thereof. It may declare a valid enactment of the territorial legislature void or a void enactment valid, although it reserved in the organic act no such power. *National Bank* v. *County of Yankton*, 129.
7. The Constitution of Tennessee, in force in 1838, declares that "suits may be brought against the State in such manner and in such courts as the legislature may by law direct." The statute of 1855 providing that actions might be instituted against the State under the same rules and regulations that govern those between private citizens, but conferring no power on the courts to execute their judgment, was repealed in 1865. No other law was enacted prescribing the manner or the courts in which the State could be sued. In a suit subsequently brought by the State in 1872 against the Bank of Tennessee and certain of its creditors, A., who was admitted a defendant, filed a cross-bill, setting up that while the first statute was in force the bank became indebted to him, and praying that

CONSTITUTIONAL LAW (*continued*).

under the indemnity clause of its charter a decree be rendered against the State for the amount of the debt. The cross-bill was dismissed solely upon the ground that the State could not be sued in her own courts. *Held*, that the repealing statute of 1865 did not impair the obligation of a contract, within the meaning of the contract clause of the Constitution of the United States. *Railroad Company* v. *Tennessee*, 337.

8. As applicable to the government or any of its officers, the maxim that the king can do no wrong has no place in our system of constitutional law. *Langford* v. *United States*, 341.
9. The construction by the Supreme Court of Georgia of a statute of the State under which a court made an exclusive grant of the franchise of establishing and maintaining a toll-bridge within certain limits, upon conditions which the grantee performed, is not conclusive here upon the question whether a subsequent conflicting grant impairs the obligation of a contract. *Wright* v. *Nagle*, 791.
10. In 1867, the legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum in cash, an annual payment of a further sum, and a percentage of receipts from the sale of tickets. A provision of the Constitution adopted in 1868 declares that "the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." *Held*, 1. That this provision is not in conflict with sect. 10, art. 1, of the Constitution of the United States, which prohibits a State from "passing a law impairing the obligation of contracts." 2. That such a charter is in legal effect nothing more than a license to enjoy the privilege conferred for the time, and on the terms specified, subject to future legislative or constitutional control or withdrawal. *Stone* v. *Mississippi*, 814.
11. *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518) commented upon and explained. *Id.*
12. The legislature cannot, by chartering a lottery company, defeat the will of the people of the State authoritatively expressed, in relation to the continuance of such business in their midst. *Id.*
13. *Railroad Company* v. *Tennessee* (*supra*, p. 337) cited and approved. *Railroad Company* v. *Alabama*, 832.
14. Where the statute of Alabama subjecting her to suit in her courts was in force at the time when a contract with her was made and a suit thereon brought, but their functions were essentially those of a board of audit, and the plaintiff had no means of enforcing the payment of a judgment or a decree in his favor, — *Held*, that the repeal of the statute deprives the court of jurisdiction to proceed, and is not in violation of the contract clause of the Constitution of the United States. *Id.*

CONSTRUCTIVE NOTICE. See *Municipal Bonds*, 2.

CONTRACTS. See *Constitutional Law*, 7, 10, 14; *Court of Claims*, 2, 3; *Guaranty; Married Woman, Separate Estate of*, 1, 2; *Principal and Agent*, 2; *Private Property taken for Public Use; Specific Performance; Statutes, Construction of*, 2; *Trade*.

1. A., B., & Co., a firm engaged in selling live-stock on commission, authorized a bank to cash drafts drawn on the firm by C., their agent, who forwarded live-stock to them. Some controversy arising, A., B., & Co. wrote to the bank as follows: —

"JAN. 15, 1876.

"Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to C."

The cashier of the bank replied as follows: —

"JAN. 17, 1876.

"Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to C. on stock to come in. Have always supposed it was in transit. After this we shall require ship'g bill."

There was no further communication on this subject between the parties. Two clerks of A., B., & Co. who were aware of this correspondence became partners without the knowledge of the bank, and the business was thereafter carried on in the same name. C. continued to draw on the firm as before, and the bank, without requiring bills of lading, to cash the drafts, all of which were accepted and paid by the firm. The bank acted in good faith. C. absconded with the proceeds of two drafts, and the firm brought this action against the bank to recover the amount. *Held*, 1. That the letters constitute no contract, and the bank is not responsible to the firm for cashing the drafts without bills of lading attached. 2. That if, however, a contract did arise from the cashier's unanswered letter of Jan. 17, 1876, it was with the then existing firm, and ceased on the subsequent change thereof by the admission of new members, without the knowledge or the consent of the bank. *National Bank* v. *Hall*, 43.

2. March 1, 1876, A., by way of collateral security for his notes of even date, payable four months thereafter, made an instrument in writing assigning to B., the payee of them, a judgment against C., and authorizing him to sell it, in case they should not be paid at maturity, and apply the proceeds to the payment of them. C., at said date, had sufficient personal property to satisfy the judgment. Execution was issued June 19, but that property had been previously exhausted by the levy of other executions. In a suit by B. against A. on the notes, — *Held*, 1. That B. was not bound by the terms of the assignment to take steps for the collection of the judgment before the maturity of the notes. 2. That, in the absence of accident, mistake, or fraud, evidence was not admissible to show his parol agreement, made contemporaneously with the assignment and

CONTRACTS *(continued)*.

as part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon. *Bast* v. *Bank*, 93.

3. A contract is contrary to public policy, and void, whereby, in consideration of A.'s procuring B.'s appointment as special counsel in certain causes against the United States, and aiding him in managing the defence of them, B. agrees that he will pay A. one-half of the fee which he may receive from the government. *Meguire* v. *Corwine*, 108.
4. A gas company which contracted, for a valuable consideration, to furnish a city with gas "free of charge," paid thereon the tax imposed by sect. 94 of the Internal Revenue Act of June 30, 1864 (13 Stat. 264), as amended by the act of July 13, 1866. 14 id. 128. *Held*, that the city is not liable to the company for the amount so paid. *Gas Company* v. *Pittsburgh*, 219.
5. Where a corporation, organized pursuant to the provisions of a statute, but before its articles of association were filed with the county clerk, entered into a contract for certain machinery to enable it to carry on its business, — *Held*, that its subsequent recognition of the validity of the contract was binding upon it, although the statute declares that a corporation so organized shall not commence business before such articles are so filed. *Whitney* v. *Wyman*, 392.
6. The act of the General Assembly of South Carolina, passed June 9, 1877; entitled "An Act to provide the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the State and the tax-payer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank. *South Carolina* v. *Gaillard*, 433.
7. After that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them. *Id.*
8. The terms of a contract under seal may be varied by a subsequent parol agreement. *Canal Company* v. *Ray*, 522.
9. A company incorporated by a statute of Pennsylvania approved April 8, 1864, was authorized to construct a railway on certain streets of Philadelphia, subject to the ordinances of the city regulating the running of passenger railway cars. The charter requires, among other things, that the "company shall also pay such license for each car run by said company as is now paid by other passenger railway companies" in said city. That license was $30 for each car. An ordinance passed in 1867 increased the license charge to $50, and in 1868, by a general statute, the legislature provided that the passenger railway corporations of Philadelphia should pay annually to the city $50, as required by their charters, for each car intended to run on their roads during the year, and that the city should have no power to regulate such corporations unless authorized by the laws of the State expressly in terms relating to those corporations. The

CONTRACTS (*continued*).
company paid the increased charge until 1875. On its refusing to pay it thereafter this suit was brought. *Held*, that the charter did not amount to a contract that the company should never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated. *Railway Company* v. *Philadelphia*, 528.
10. In their widest sense, the words employed in the charter mean that the company should not then be required by the city to pay any greater charge as license than that paid by other companies possessing the same privilege. *Quære*, without further legislation, could a greater sum have been exacted from the company? *Id.*
11. *Semble*, that even if the charter were sufficient to import a contract, the legislature, under the constitutional provision then in force touching the alteration, revocation, or annulment of any charter in such manner that no injustice be done to the corporators, had ample power to pass the act raising the license fee from thirty to fifty dollars. *Id.*

COPYRIGHT.
1. A claim to the exclusive property in a peculiar system of book-keeping cannot, under the law of copyright, be maintained by the author of a treatise in which that system is exhibited and explained. *Baker* v. *Selden*, 99.
2. The difference between a copyright and letters-patent stated and illustrated. *Id.*

CORPORATIONS. See *Contracts*, 5; *Stockholders, Individual Liability of*, 1.
1. The powers of a corporation organized under a legislative charter are only such as the statute confers; and the enumeration of them implies the exclusion of all others. *Thomas* v. *Railroad Company*, 71.
2. While a corporation must dwell in the State which created it, its existence may be elsewhere acknowledged and recognized. Its residence creates no insuperable objection to its power of contracting in another State. *Christian Union* v. *Yount*, 352.
3. In harmony with the general law of comity among the States composing the Union, the presumption is to be indulged that a corporation, if not forbidden by its charter, may exercise the powers thereby granted within other States, including the power of acquiring lands, unless prohibited therefrom, either in their direct enactments or by their public policy, to be deduced from the general course of legislation or the settled adjudications of their highest courts. *Id.*
4. This court cannot presume that it is now, or was in 1870, against the public policy of Illinois that one of her citizens owning real estate there situate should convey it to a benevolent or missionary corporation of another State of the Union, for the purpose of enabling it to carry out the objects of its creation, since she

CORPORATIONS (*continued*).

permitted her own corporations, organized for like purposes, to take such real estate by purchase, gift, devise, or in any other manner. *Id.*

5. Where land in Illinois was conveyed to a New York corporation, the children and heirs-at-law of the grantor, who file their bill to set aside the conveyance upon the ground that it was against the public policy of Illinois, cannot raise the question that the grantee acquired a larger quantity of lands than its charter allowed. *Id.*
6. *Carroll* v. *The City of East St. Louis* (67 Ill. 568) and *Starkweather* v. *American Bible Society* (72 id. 50) distinguished. *Id.*
7. A corporation of New York having authority to mortgage its property for the purpose of carrying on its business is not prohibited by the laws of that State from executing such a mortgage to secure the payment of money to be thereafter advanced. *Jones* v. *Guaranty and Indemnity Company*, 622.

CORPORATIONS, INDIVIDUAL LIABILITY OF OFFICERS THEREOF.

A statute of Connecticut enacts that the president and secretary of each corporation organized thereunder shall annually make a certificate showing the condition of the affairs of the corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, setting forth the amount of capital actually paid in, the cash value of its credits, the amount of its debts, the name and number of shares of each stockholder, and deposit it, on or before the fifteenth day of February or August, with the town clerk of the town in which the corporation transacts its business. It also provides that if such president or secretary shall intentionally neglect or refuse to comply with said provisions, and to perform the duty required of them respectively, the persons so neglecting or refusing shall be jointly and severally liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal. In an action by a creditor of such corporation against its president, — *Held*, 1. That the statute is penal, and must be strictly construed. 2. That the defendant is not liable, if the debt was contracted by the corporation before, although it may remain unpaid during, the period when he neglected or refused to comply with the requirements of the statute. *Steam-Engine Company* v. *Hubbard*, 188.

COURT AND JURY. See *Practice*, 2, 20.

COURT OF CLAIMS. See *Claims against the United States*, 2.

1. *Quære*, where lands which are confessedly private property are by the express authority of the government taken for public use, can the just compensation therefor which is guaranteed by the Constitution be recovered under existing laws in the Court of Claims? *Langford* v. *United States*, 341.
2. That court has jurisdiction only in cases *ex contractu*, and an implied

COURT OF CLAIMS (*continued*).
contract to pay does not arise where the officer of the government, asserting its ownership, commits a tort by taking forcible possession of the lands of an individual for public use. *Id.*
8. The provision restricting that jurisdiction to contracts express or implied refers to the well-understood distinction between matters *ex contractu* and those *ex delicto*, and is founded on the principle, that while Congress is willing to subject the government to suits on contracts, which can be valid only when made by some one thereunto vested with authority, or when under such authority something is by him done which raises an implied contract, that body did not intend to make the government liable to suit for the wrongful and unauthorized acts which are committed by its officers, under a mistaken zeal for the public good. *Id.*

COVENANTS. See *Lien*, 6–8.

CREDITOR. See *Bankruptcy; Equity*, 2–4; *Mortgage*, 3, 5; *Wife, Voluntary Settlement upon*, 1, 6.

CUSTOMS, COLLECTOR OF.
1. The act of Feb. 26, 1867 (14 Stat. 410), abolishing a former collection district in Maryland, and forming from a portion thereof a new district, provides that the collector "shall receive an annual salary of $1,200." A. held the office of collector from April 19, 1867, until April 1, 1875. On July 18, 1867, the Commissioner of Customs required him, in writing, to account for *all* fees received by him as such. He accordingly thereafter paid them into the treasury. *Held*, 1. That in addition to his salary A. was entitled to the fees and emoluments allowed to such officers by pre-existing legislation. 2. That having paid them into the treasury pursuant to a peremptory order of his superior officer he was not thereby precluded from recovering them in a suit against the United States. *United States* v. *Lawson*, 164.
2. The ruling in *United States* v. *Lawson* (*supra*, p. 164), that a collector of customs, who, pursuant to the peremptory order of the Commissioner of Customs, pays into the treasury moneys to which he is lawfully entitled as a part of the fees and emoluments of his office, is not precluded from recovering them in a suit against the United States, reaffirmed and applied to this case. *United States* v. *Ellsworth*, 170.

CUSTOMS DUTIES.
1. Between Aug. 28 and Oct. 18, 1874, A. imported into the port of New York certain articles known as "tin in plates," "terne plates," and "tagger's tin," upon which the collector imposed a duty of fifteen per cent *ad valorem*. *Held*, that, under sects. 2503 and 2504 of the Revised Statutes, said articles were dutiable at only ninety per cent of that rate. *Arthur* v. *Dodge*, 34.
2. *Davies* v. *Arthur* (96 U. S. 148) and *United States* v. *Bowen* (100 id. 508) cited and approved. *Id.*

CUSTOMS DUTIES *(continued)*.

3. In 1862 and 1863, A. imported into the port of Boston certain goods upon which the collector imposed, and A. under protest paid, a duty of thirty per cent *ad valorem* under the mixed-material clause of the act of March 2, 1861 (12 Stat. 192), and of two cents per square yard under the ninth section of the act of July 14, 1862. Id. 553. A., claiming that under the act of 1862 the goods were subject only to an *ad valorem* duty of thirty per cent, brought suit to recover the difference. It appeared in evidence that the goods were known in trade and were bought and sold as poil de chevres, reps, plaids, lustres, Saxony dress-goods; that they were always woven in colors, the yarns being dyed or colored before weaving; that they never existed in the gray or uncolored condition, but were made as delaines are made, with a cotton warp and worsted weft, the difference between them and delaines being that the latter are a fabric of all-wool, or cotton warp and worsted weft, made of yarns not dyed, the cloth being printed or dyed in the piece; that as early as 1857 both the all-wool delaines and those with cotton warp and wool or worsted filling were known in trade by names changing from time to time, to suit the fancy of importers and purchasers. It also appeared that in several other particulars A.'s goods differed from delaines. The court charged the jury that, in addition to the duty of thirty per cent *ad valorem* imposed by the act of 1861, the act of 1862 "imposed a specific duty on all delaines, whether colored or uncolored, and all goods of similar description to delaines, whether colored or uncolored, if such delaines or goods of similar description do not exceed in value forty cents a square yard," and that it was for them to determine whether A.'s goods were "similar in description to these delaines, whether they are colored or uncolored." *Held*, that the instruction was proper. *Greenleaf* v. *Goodrich*, 278.
4. The changes of classification and phraseology made in the act of 1862 show an intention to take out of the mixed-material clause of the act of 1861 (which was limited to manufactures not otherwise provided for) some descriptions of goods which the act placed there, and, by transferring them to another class, subject them to the additional duty prescribed for that class. *Id.*
5. The phrase "of similar description" is not a commercial term, and the tariff acts do not contemplate that goods classed under it shall be in all respects the same. *Id.*
6. Opium, the product of Persia, imported to the United States from a country west of the Cape of Good Hope, is subject to the additional duty of ten per cent *ad valorem* imposed by the third section of the act of June 6, 1872. 17 Stat. 232; Rev. Stat., sect. 2501. *Powers* v. *Comly*, 789.

DECREE. See *Appeal*, 3; *Equity*, 2, 4; *Lien*, 12; *Practice*, 22; *Res Judicata*, 3, 4.

DEED. See *Estoppel*, 1.

DEED OF TRUST. See *Married Woman, Separate Estate of*, 4.

DEED, REFORMATION OF.

1. Where, as in this case, the evidence exhibited in the record shows that the purchase of land was made upon certain trusts which through mistake the trustee failed to have properly declared in the deed, the *cestui que trust* is entitled to a decree directing the deed to be reformed. *Walden* v. *Skinner*, 577.
2. The jurisdiction of the Circuit Court is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same State as the complainant, to perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the State. *Id.*

DEMURRER. See *Pleading.*

DES MOINES RIVER GRANT. See *Taxation*, 6, 7.

1. It has been settled in this court that the title of the Des Moines Navigation and Railroad Company to the lands donated to the State of Iowa for the improvement of the Des Moines River by the act of Aug. 8, 1846 (9 Stat. 77), is good against the State, the railroad companies claiming under the act of May 15, 1856 (11 id. 9), and, after 1855, as against pre-emptors under the act of Sept. 4, 1841. 5 id. 453. *Wolsey* v. *Chapman*, 755.
2. The order of the Secretary of the Interior of April 6, 1850, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was, in contemplation of law, the order of the President, and had the same effect as a proclamation mentioned in said act of 1841. Being so reserved, they were not subject to selection by the State of Iowa, as forming a part of the five hundred thousand acres granted to her for internal improvements, which she, with the consent of Congress, appropriated to the use of common schools. *Id.*
3. The title which the State acquired to the lands above said Raccoon Fork by the joint resolution of March 2, 1861 (12 Stat. 251), and the act of July 12, 1862 (id. 543), inured to the *bona fide* purchasers from the State under the grant of Aug. 8, 1846, and not to parties whose right is derived from her claim to them for school purposes. *Id.*
4. Those acts give the State and such *bona fide* purchasers the same assurance of title as if the act of 1846 had granted all that succeeding legislation secured for the river improvement. *Id.*
5. The adjustment made in 1866 by the Department of the Interior and a commissioner acting under the authority of the State of Iowa, and ratified by an act of Congress, approved March 3, 1871 (16 Stat. 582), settled the rights of no parties other than the State and the United States. *Id.*
6. The contract entered into June 9, 1854, between the State and the Des Moines Navigation and Railroad Company, contemplated a conveyance of all the river-grant lands not sold by the State on Dec. 23, 1853. By a joint resolution passed March 22, 1858, the

DES MOINES RIVER GRANT (*continued*).
State agreed to convey to the company all the lands contained in said grant except such as she had sold thereon prior to Dec. 23, 1853. *Held*, that the land in controversy having been certified as part of the lands granted to Iowa for the improvement of Des Moines River, the governor of the State was authorized to convey it to said company. *Id.*

DEVASTAVIT. See *Executor*, 4.

DEVISE. See *Charitable Bequest.*

DISTRICT OF COLUMBIA. See *Equity*, 2; *Lien*, 11–13.

DIVIDED COURT, JUDGMENT OF AFFIRMANCE BY. See *Practice*, 11.

DONATION ACT. See *Land Department, Decisions of the Officers thereof*, 6, 7.

1. The act of Congress approved Sept. 27, 1850 (9 Stat. 496), commonly known as the Donation Act, granted to each person having the requisite qualifications the right to settle upon and cultivate a tract of public land in Oregon not in any case exceeding in extent one section, or six hundred and forty acres, in order that he might, upon complying with all the prescribed conditions and making proof thereof, be entitled to a patent for such tract. *Hall* v. *Russell*, 503.
2. The title to the soil does not vest in the settler before the conditions have been fully performed. *Quære*, does it pass from the United States until the requisite final proof of their performance be made? *Id.*
3. A., an unmarried man, settled, in 1852, upon a half-section of public land in Oregon, and, after residing thereon less than a year, died. *Held*, that he had no devisable interest in the land. *Id.*
4. A wife or her heirs get nothing under that act before her husband, or some one for him, proves up the claim. *Vance* v. *Burbank*, 514.

DURESS. See *Charter-party*, 1.

EJECTMENT. See *Equity*, 4; *Public Lands*, 2.

EQUITABLE LIEN. See *Lien*, 2, 6–8.

EQUITY. See *Land Department, Decisions of the Officers thereof*, 5, 7; *Lien*, 1; *Municipal Bonds*, 12; *Pleading*, 3; *Practice*, 14, 15; *Stockholders, Individual Liability of; Taxation*, 4, 8.

1. Unless otherwise provided by legislative enactment, a resident taxpayer has the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which he in common with other property-holders may otherwise be compelled to pay. *Crampton* v. *Zabriskie*, 601.
2. A bill filed by A. for himself and other creditors against B., executor of C., and the devisees of the latter, alleged that C. was indebted to him, that the personal assets were insufficient to pay the debts, and

EQUITY (*continued*).

that B. was paying some of them in full and leaving others unsatisfied. It prayed for an account of the personal estate, the application thereof to the payment of the debt, and the discovery of the real estate whereof C. died seised. The defendants pleaded in bar that B. had in his hands assets sufficient to pay A.'s claim and all others. To this plea A. filed a replication. The proofs sustained the allegations of the bill, but showed those of the plea to be untrue. *Held*, 1. That A. was entitled to a decree as though the bill had been confessed or admitted. 2. That as by reason of B.'s admission of assets no discovery was required, a decree against him rendering him individually liable was proper. 3. That there is nothing in the local law of the District of Columbia or in the jurisdiction of the Supreme Court of said District, sitting as a probate court, inconsistent with these rulings. *Kennedy* v. *Creswell*, 641.

3. Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his remedy at law. *Case* v. *Beauregard*, 688.

4. Where judgments were rendered against a railway company in Wisconsin, and the assignee of the older one, in order to enforce his lien, filed his bill against another company, who, under claim of right, had obtained possession of the road, — *Held*, 1. That the junior judgment creditor was not a necessary party, although, before the bill was filed, he had put on record in the proper office the sheriff's deed conveying the road to him pursuant to a sale under an execution sued out upon his judgment. 2. That he could not maintain ejectment against the purchasers, under the decree directing the sale of the road to satisfy the older judgment. *Howard* v. *Railway Company*, 837.

ESTOPPEL. See *Corporations*, 5; *Customs, Collector of; Executor*, 5; *Married Woman, Separate Estate of*, 4; *National Banks; Non-negotiable Demands; Res Judicata.*

1. In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. *Bank of America* v. *Banks*, 240.

2. A. conveyed premises in 1851 to B., and took from him a mortgage for the purchase-money. Both deeds were recorded. B. never took possession. A., by an instrument recorded March 19, 1852, assigned the mortgage to C., who conveyed the premises with warranty to D., under whom complainant claims title. B. lived near the premises for years, and knew that C. and others were in adverse possession claiming title, but never claimed or intimated that he had himself any title. B. drew the conveyance of C. to D., and as a notary public took C.'s acknowledgment thereto, and was silent as to any defect in the title. B. executed a quit-claim deed of the premises in 1872 to a stranger. *Held*, that the facts made a complete case of *estoppel in pais*, and that nothing passed by B.'s deed. *Baker* v. *Humphrey*, 494.

ESTOPPEL (*continued*).

3. In a suit against B. upon his contract guaranteeing the payment of the purchase-money of certain land, A. recovered judgment for the first instalment. In a subsequent suit for the remaining ones, B. set up the same defence as in the first suit, that the contract was induced by the fraudulent representations of A. as to the quantity of timber on the land, and he moreover alleged that they amounted to a warranty, upon the breach of which he was entitled to recoup the damages sustained. *Held*, that the judgment, having been rendered on the finding of a referee that such representations were not made, is conclusive, as to the facts found, in all subsequent controversies between the parties to the contract. *Lumber Company* v. *Buchtel*, 638.

EVIDENCE. See *Contracts*, 2; *Mortgage*, 2; *Practice*, 6.

1. An executor charged himself in the inventory of the estate of the testator with a note payable to the latter and secured by mortgage. His accounts were settled on that basis. An administrator with the will annexed subsequently brought suit to foreclose the mortgage. *Held*, 1. That the probate record showing the inventory and the order for distributing the assets of the testator is not conclusive evidence that the note has been paid. 2. That an executor's settlement when adjudicated binds only the parties thereto. *Butterfield* v. *Smith*, 570.
2. In an action of trespass to try the title to lands in Texas, the plaintiff put in evidence a grant of them to A., as shown by certified copies of papers from the general land-office of that State. He then offered a deed from A. to B. for other and different lands, and one from C. and wife, the latter being the only heir-at-law of A., reciting that there was a misdescription in A.'s deed, and releasing, alienating, and conveying to B. the lands in the declaration mentioned. The acknowledgment of the deed of C. and wife, required by the laws of that State to pass the estate of a married woman, was not made until after the commencement of the suit. The plaintiff also offered a deed to him from the heirs-at-law of B. for all the lands belonging to the latter at the time of his decease, or to which he was then entitled, but did not propose to show that B. had any title to the lands other than that shown by the other deeds. The deeds were excluded, and the jury instructed to find for the defendants. *Held*, that the action of the court was proper. *Hollingsworth* v. *Flint*, 591.
3. The United States brought suit, Oct. 9, 1872, against A. on his bond, conditioned that he should account and pay for certain stamps. Pleas, *non est factum*, the non-delivery of the stamps, and performance. At the trial in April, 1876, the court, over A.'s objection, permitted the plaintiff to put in evidence a copy of the bond and of A.'s receipts for the stamps, together with a treasury transcript showing a balance due by him of $4,400. To these papers was attached a certificate bearing date Oct. 11, 1872, and reciting that it was issued pursuant to the act of March 3, 1797. The defendant intro-

EVIDENCE *(continued)*.

duced no evidence, but requested the court to charge the jury that he was entitled to have deducted from said $1,400 a commission of ten per cent "on the same as allowed by the act of Congress of June 30, 1864, amended in 1870, and incorporated in the Revised Statutes under section 3425." The court refused so to charge. *Held*, 1. That the papers were competent evidence. 2. That the refusal of the court to charge as requested by the defendant was proper. *Bechtel* v. *United States*, 597.

EXCEPTIONS, BILL OF. See *Practice*, 3, 4.

Where the bill of exceptions does not show what answer was made to a question put to a witness, error cannot be assigned upon the question. *Lovell* v. *Davis*, 541.

EXECUTIVE DEPARTMENTS.

The orders of the head of an executive department, in reference to matters within its general supervision and control, are, in contemplation of law, those of the President, and have the same binding effect. *Wolsey* v. *Chapman*, 755.

EXECUTOR. See *Equity*, 2.

1. Parties who deal with an executor, exercising his power of disposition of the personal assets of the estate in his hands, to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, are bound to look into his authority, and are held to a knowledge of all the limitations which the will, as well as the law, puts thereon. *Smith* v. *Ayer*, 320.
2. His sale or pledge of assets, made for other purposes than the discharge of his duties as executor, will not be sustained where the purchaser or pledgee takes them with knowledge or notice of the perversion of them, or the intended perversion of their proceeds. *Id.*
3. Such assets are held by him in trust to pay the debts of the testator, and then to discharge legacies. Where, therefore, they are acquired from him by third parties, with knowledge of his trust and of his disregard of its obligations, they can be followed and recovered. *Id.*
4. At the time of his death A. held in his name an interest in a commercial firm, which he had acquired by funds belonging one-third to himself, one-third to the children of a deceased brother, and one-third to a sister. In his will, of which B., his brother, was appointed executor, A. made a request that the whole of such interest should be retained in the firm, under the control of B., so long as the latter should deem it profitable. His own interest he bequeathed to B., in trust for the latter and certain nephews and nieces, in equal proportions, to be held and controlled by B. so long as he should deem it advisable. One of the members of the firm having withdrawn therefrom, B. purchased his interest, whereupon the firm name was changed. Subsequently, to raise funds wherewith

EXECUTOR (*continued*).

to pay loans made to the firm, B. pledged to C. certain notes which had come into his possession as executor. *Held*, 1. That, assuming the identity of the firm remained after the change of its members and name, the authority of B., as executor, to continue a specifically designated existing interest in the firm did not extend to the use in its business of any other funds or property of the estate. 2. That his use of the notes to raise funds for the firm was a misappropriation of them, and that C., having knowledge of the directions of the testator, cannot hold them against the claim of his representatives. *Id.*

5. An executor's settlement, adjudicated by the probate court, binds only the parties thereto. *Butterfield* v. *Smith*, 570.

FEIGNED ISSUE.

1. The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court, and the party submitting it must procure, for the use of the Chancellor, notes of the proceedings at the trial, and of the evidence there given. *Watt* v. *Starke*, 247.
2. The evidence and proceedings become then a part of the record, and are subject to review by the appellate court should an appeal from the decree be taken. *Id.*
3. These rules are not affected by the second section of the act of Feb. 16, 1875 (18 Stat., part 3, p. 315), which provides that in a patent case the Circuit Court, when sitting in equity, may impanel a jury and submit to them such questions of fact as it may deem expedient. *Id.*
4. *Harmon* v. *Johnson* (94 U. S. 371) reaffirmed. *Id.*

FIRE, DESTRUCTION OF BUILDINGS TO PREVENT SPREAD OF.

1. Under the statute of Massachusetts, and the ordinance of Boston adopted pursuant thereto, that city is not responsible to the owner of buildings there situate which are destroyed in order to prevent the spreading of a fire, unless a joint order for their destruction be given by three or more engineers of the fire department, who are present, of whom the chief engineer, if present, must be one. *Bowditch* v. *Boston*, 16.
2. As it is only by force of the statute and ordinance that the city incurs a liability to such owner, he is not entitled to recover unless his case be within their terms, and the joint order be shown. *Id.*

FOURTEENTH AMENDMENT. See *Constitutional Law*, 2–5.

FRANCHISE. See *Constitutional Law*, 9; *Georgia*, 1; *Railroads.*

FRAUD. See *Limitations, Statute of.*

FRAUDS, STATUTE OF.

Where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the de-

FRAUDS, STATUTE OF (*continued*).
fendant, where there is no written evidence of such agreement, may, at the hearing, insist on the Statute of Frauds as effectually as if it had been pleaded. *May* v. *Sloan*, 231.

FRENCH AND SPANISH LAND GRANTS. See *Private Land Claims*.

FUTURE ADVANCES. See *Mortgage*, 1.

GEORGIA. See *Constitutional Law*, 9.

1. This court follows the decision of the Supreme Court of Georgia, that authority to grant the franchise of establishing and maintaining a toll-bridge over a river where it crosses a public highway in that State, is vested solely in the legislature, and may be exercised by it, or be committed to such agencies as it may select. *Wright* v. *Nagle*, 791.
2. The statutes of Georgia confer upon certain courts the power to establish such bridges, but not to bind the public in respect to its future necessities. The legislature could, therefore, authorize the erection and maintenance of another bridge within the limits of the original grant. *Id.*

GUARANTY. See *Bills of Exchange and Promissory Notes; Lien*, 15, 16; *National Banks*.

A. contracted to sell B. a tract of pine land at a stipulated sum, payable in future instalments, a conveyance to be made only upon payment of the several sums as they became due, the cutting or removal of the timber being in the mean time prohibited without the written permission of A. Two days afterwards B. assigned the contract to C. A. assented to the assignment, and gave C. permission to enter the lands and cut and remove the timber, in consideration whereof the latter guaranteed the payments stipulated in the contract. The first instalment due not having been paid, A. brought suit against C. upon the guaranty. The latter set up the defence that he was induced to enter into the undertaking by the false and fraudulent representation of A. as to the quantity of good merchantable timber contained in the tract. The case was, by stipulation of the parties, tried before a referee, who reported that the representations were made by an agent of B., and that he did "not find" that A. participated therein. *Held*, 1. That A.'s grant of permission to C. to cut and remove the timber was the release of an important security to him against possible loss if payment were not made on the contract, and that the guaranty was a reasonable exaction from C. therefor. 2. That said representations not coming from A., nor relating to the permission to cut and remove the timber, did not release C. from liability on the guaranty. *Lumber Company* v. *Buchtel*, 633.

HUSBAND AND WIFE. See *Married Woman, Separate Estate of; Wife, Voluntary Settlement upon.*

ILLINOIS. See *Corporations*, 4, 5.

The act of the General Assembly of Illinois, approved March 5, 1867, establishing the State Reform School, examined. The provision, authorizing municipal corporations to donate money to secure the location of the school within their limits, sustained as not being in conflict with the constitution of the State, adopted in 1848, there being no settled or uniform decision to the contrary by her Supreme Court. *County of Livingston* v. *Darlington*, 407.

IMPLIED CONTRACT. See *Court of Claims*, 2, 3; *Private Property taken for Public Use.*

IMPORTS, DUTIES ON. See *Customs Duties.*

INDIANA. See *Limitations, Statute of.*

INDORSEMENT. See *Bills of Exchange and Promissory Notes.*

INFRINGEMENT. See *Letters-patent*, 1, 3–5, 14, 15.

INJUNCTION. See *Land Department, Decisions of the Officers thereof; Letters-patent*, 1; *Municipal Bonds*, 12; *Taxation*, 4, 5; *Trade-marks*, 2.

INSANE PERSON, SALE OF HIS LANDS BY HIS GUARDIAN. See *Jurisdiction*, 8.

INSTRUCTIONS TO JURY. See *Practice*, 2–4.

INSURANCE, COVENANTS FOR. See *Lien*, 6–8.

INTEREST. See *Internal Revenue*, 3; *Practice*, 22; *Taxation*, 7, 8.

INTERNAL REVENUE.

1. By the act of July 13, 1866 (14 Stat. 135, sect. 103 of the act of 1864, as amended), "every . . . corporation owning . . . any railroad . . . engaged or employed in . . . transporting the mails of the United States upon contracts made prior to Aug. 1, 1866, shall be subject to and pay a tax of two and one half per cent of the gross receipts" from such service. In a suit against a railroad company to recover said tax no express contract for carrying the mails was proved, but it appeared that the company had been carrying them, and that the services for which it had been paid commenced before Aug. 1, 1866, and continued without interruption until Jan. 1, 1870. *Held*, 1. That the law implies that a contract was entered into prior to Aug. 1, 1866. 2. That the company is liable for that tax. *Railroad Company* v. *United States*, 543.
2. A railroad company paid, Aug. 1, 1870, to the holders of its bonds $61,495 as interest then due. *Held*, that the company was liable to the United States to a tax of five per cent on that amount. *Id.*
3. The "tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date," by any railroad company, is a tax on the interest, not as it accrues, but when it is paid. *Id.*

INTERNAL REVENUE, COLLECTOR OF.

1. A collector of internal revenue, when sued on his bond for the balance of taxes charged to him under sect. 3218, Rev. Stat., is entitled to a credit for all uncollected taxes he transferred to his successor, if he proves that he used due diligence to collect them. *United States* v. *Kimball*, 726.
2. The certificate of the Commissioner of Internal Revenue, that the collector used such due diligence, is a condition precedent to the allowance of a credit on the books of the treasury by the First Comptroller, before the suit was brought, but not to a defence upon the trial. *Id.*
3. The rejection by the Commissioner of a claim for such credit presented by the collector entitles the latter, when sued for such taxes, to prove his claim. *Id.*

IOWA. See *Des Moines River Grant.*

JUDICIAL COMITY. See *Charitable Bequest; Illinois; Georgia*, 1; *Municipal Bonds*, 6, 7, 15, 17; *Res Judicata*, 3; *Taxation*, 6.

JUDICIAL DISCRETION. See *Mandamus*, 1.

JUDICIAL SALE. See *Equity*, 4.

The purchase by the solicitor of a railroad company of its property at a judicial sale, made pursuant to a decree in a foreclosure suit, is not of itself necessarily invalid. It will, however, be closely scrutinized, but until impeached must stand. *Pacific Railroad* v. *Ketchum*, 289.

JUDGMENT. See *Lien*; 1; *Practice*, 11, 12; *Res Judicata*, 1, 2.

JURISDICTION. See *Admiralty; Appeal; Causes, Removal of*, 1; *Charitable Bequest*, 1; *Constitutional Law*, 14; *Court of Claims; Equity*, 2; *Land Department, Decisions of the Officers thereof*, 2, 3, 4; *Municipal Bonds*, 2; *Practice*, 1.

I. Of the Supreme Court.

1. The order of the Circuit Court remanding a cause to the State court whence it was removed is reviewable here. *Ayers* v. *Chicago*, 184.
2. *Removal Cases* (100 U. S. 457) cited and approved. *Id.*
3. Where the record shows that the appellee, who raises the objection that the lands which are the matter in controversy are not of sufficient value to give this court jurisdiction, bought them for $21,000, and by virtue of that purchase claims them here, and the prayer for appeal, which is verified by the affidavit of the appellant, shows that they are worth more than $5,000, — *Held*, that this court has jurisdiction. *May* v. *Sloan*, 231.
4. The finding of the Circuit Court upon a question of fact cannot be reviewed on a writ of error. *United States* v. *Dawson*, 539.

II. Of the Circuit Court.

5. The ruling in *Removal Cases* (100 U. S. 457), on the second section of the act of March 3, 1875 (18 Stat., part 3, 470), stated and de-

JURISDICTION (*continued*).
clared to be applicable to the jurisdiction of the Circuit Court, as the same is prescribed by the first section of that act. *Pacific Railroad* v. *Ketchum*, 289.
6. The Circuit Court of the United States cannot revise or set aside the final decree rendered by a State court which had complete jurisdiction of the parties and subject-matter. *Nougué* v. *Clapp*, 551.
7. The jurisdiction of the Circuit Court is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same State as the complainant, to perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the State. *Walden* v. *Skinner*, 577.

III. In General.
8. The statute of Wisconsin which provides for the sale of the real estate of a lunatic to pay his debts when his personal property is insufficient therefor, enacts that the order of the county court to show cause why the application of the guardian for a license to sell such real estate shall not be granted "shall be published at least four successive weeks in such newspaper as the court shall order, and a copy thereof shall be served personally on all persons interested in the estate and residing in the county in which such application is made, at least fourteen days before the day therein appointed for showing cause: *Provided, however*, if all persons interested in the estate shall signify in writing their assent to such . . . sale the notice may be dispensed with." It also enacts that the court, "upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale, of all persons interested, shall proceed to the hearing of such petition, and, if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who shall think proper to oppose the application." A. was duly declared to be a lunatic, and his lands in that State were on the petition of his guardian sold by order of the proper court. The sale was reported to the court and confirmed, and a deed made to the purchaser, against whom, after the proceedings in lunacy were suspended, A. brought ejectment. He insisted that the court had no jurisdiction to make the order granting license to the guardian to sell, inasmuch as notice of the time and place of hearing the petition had not been published for the full period of four successive weeks. *Held*, 1. That the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. 2. That so far as the rights of the lunatic are concerned the jurisdiction of the court attached upon filing of the guardian's petition setting forth the facts required by the statute. 3. That as against the lunatic a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing. 4. The rulings in *Grignon's Lessee* v.

JURISDICTION (*continued*).

Astor (2 How. 319) and *Comstock* v. *Crawford* (3 Wall. 396) cited on this latter point. *Mohr* v. *Manierre*, 417.

JURY. See *Feigned Issue*, 1, 8; *Practice*, 2–4.

LABEL. See *Trade-marks*.

LADING, BILLS OF.

1. Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. *Shaw* v. *Railroad Company*, 557.
2. The rule that a *bona fide* purchaser of a lost or stolen bill or note indorsed in blank or payable to bearer is not bound to look beyond the instrument has no application to the case of a lost or stolen bill of lading. *Id.*
3. The purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a *bona fide* purchaser, nor entitled to hold the merchandise covered by the bill against its true owner. *Id.*

LAND DEPARTMENT, DECISIONS OF THE OFFICERS THEREOF.

1. An injunction or a *mandamus* will not lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez* v. *Frisbie*, 473.
2. A court will not, by reason of its jurisdiction of the parties, determine their respective rights to a tract of public land, which are the subject-matter of a pending controversy whereof that department has rightfully taken cognizance, nor will it pass a decree which will render void a patent when it shall be issued. *Id.*
3. Where the legal title is vested, the equities subject to which the patentee holds it may then be judicially enforced, and where that department has upon the uncontradicted facts committed an error of law by which the land has been awarded to a party to the prejudice of the right of another, the latter is entitled to relief. *Id.*
4. Where, however, there was a mixed question of law and fact, and the court cannot separate it, so as to ascertain what the mistake of law is, the decision of that department affirming the right of one of the contesting parties to enter a tract of public land is conclusive. *Id.*
5. A. filed his bill in a State court, alleging that, having the requisite qualifications of a pre-emptor, he had settled upon a tract of public land, but that the proper register and receiver had refused to receive the purchase-money and issue to him a certificate therefor solely upon the ground that the Department of the Interior had on appeal decided that the tract was not subject to pre-emption under the general pre-emption laws, and issued an order authorizing the entry

LAND DEPARTMENT, DECISIONS OF THE OFFICERS THEREOF (*continued*).

of the tract by B., the defendant, who claimed the right to pre-empt it under a special act of Congress, by which he will be enabled to receive a patent therefor. The bill does not show what proofs were submitted by B., but alleges that, at the instigation of him and others, the Commissioner of the General Land-Office fraudulently, and before the act passed, ordered the surveys of the lands covered by it to be withheld. The bill prayed that A. be declared to be the true owner of the tract and to have a paramount title thereto. B. demurred. *Held*, that the bill was properly dismissed. *Id.*

6. The decision of the officers of the Land Department is final upon the question whether a claimant under the Donation Act (9 Stat. 496), when he demanded his patent certificate as against other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the act. *Vance* v. *Burbank*, 514.
7. To obtain relief upon the ground of fraud, it must appear that a party was prevented thereby from exhibiting his case fully to the department, so that it may properly be said there never was a decision in a real contest about the subject-matter of inquiry. An allegation in a bill in equity that false testimony was submitted is not sufficient, where the party had opportunity to meet it and took all the appeals which the law gave. *Id.*

LANDS, AGREEMENT FOR SALE OF. See *Frauds, Statute of.*

LANDS, PARTITION OF, BY TRUSTEE.

It is not a valid objection to the partition of lands that the trustee authorized to make it did not give his personal attention to it, but, by agreement with one of the heirs demanding it, submitted it to disinterested persons, whose arbitrament he confirmed by executing the necessary indenture. *Phelps* v. *Harris*, 370.

LAPSE OF TIME. See *Pleading*, 3; *Specific Performance.*

LEASE. See *Railroads.*

1. Pursuant to the authority conferred by its charter, granted by an act of Congress approved May 20, 1870 (16 Stat. 124), the Washington Market Company offered to the highest bidder at public auction the stalls in the market for a specific term, subject to the payment of a stipulated annual rent. At the expiration of that term, A., one of such bidders, filed his bill to enjoin the company from selling the stall leased to him, claiming that he had the right to occupy it as long as he chose in carrying on his business as a butcher, provided that he thereafter paid the rent as it from time to time should become due. *Held*, that A.'s right of occupancy ceased with the term, and that the company had the right to offer the stall for sale to the highest bidder. *Market Company* v. *Hoffman*, 112.
2. A parol lease of lands in Mississippi for one year, by a woman to her husband, is not invalid. *Bank of America* v. *Banks*, 240.

LESSOR AND LESSEE. See *Rebellion, The*, 2, 3.

LETTERS-PATENT. See *Copyright; Practice*, 22.

1. Where, on the surrender of letters-patent, a disclaimer of a part of the inventions described in them is filed by the patentee in the Patent Office, and reissued letters are granted for the remainder, — *Held*, that, if in a second reissue the disclaimed inventions are embraced, he cannot sustain a bill to enjoin the infringement of them. *Leggett* v. *Avery*, 256.
2. *Quære*, are reissued letters-patent valid, if they contain any thing which the patentee disclaimed, or in the rejection of which he acquiesced, in order to obtain the original letters? *Id.*
3. While letters-patent for a combination are not infringed if a material part of it is omitted, yet if a part which is only formally omitted is supplied by a mechanical equivalent performing the same office and producing the same result, they are infringed. *Water-Meter Company* v. *Desper*, 332.
4. The courts in this country cannot declare that any one of the elements entering into such a combination is immaterial. They can only decide whether a part omitted by the alleged infringer is supplied by an equivalent device. *Id.*
5. Reissued letters-patent No. 5806, granted March 24, 1874, being a reissue of original letters No. 109,372, granted Nov. 22, 1870, to Phinehas Ball and Benaiah Fitts, for an improvement in liquid meters, are not infringed by letters-patent No. 144,747, granted Nov. 18, 1873, to Henry A. Desper, for an improvement in fluid meters. *Id.*
6. The action of the Commissioner of Patents in granting letters-patent does not conclude the question whether there was not an abandonment. A person charged with infringing them may show that before they were issued the patentee had abandoned his invention. The intention to abandon may be manifested otherwise than by words. *Planing-Machine Company* v. *Keith*, 479.
7. There may be an abandonment after or before an application for letters has been made and rejected, or withdrawn. *Id.*
8. An inventor must comply with the statutory conditions. He *cannot without cause* hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it. *Id.*
9. The facts concerning the application for letters-patent No. 138,462, granted to Joseph P. Woodbury, April 29, 1873, for an alleged new and useful improvement in planing-machines, stated. It appears, among other things, that it was rejected and nothing done thereafter for many years; that he meanwhile obtained other letters, and knew that thousands of planing-machines containing his alleged invention were manufactured, sold, and used in the United States. *Held*, that his inaction, delay, and silence for more than sixteen years encouraged such manufacture and sale, and that the circumstances showed his abandonment of it. *Id.*

LETTERS-PATENT (*continued*).

10. The rule in the Patent Office, which, previous to the revised patent act of July 8, 1870, provided that "an application rejected, or not prosecuted, within two years after its rejection or withdrawal, should be conclusively presumed to have been abandoned," being at most only a rule of practice adopted by that office and not always enforced, was no bar to a movement by an inventor to have his application reinstated after its withdrawal. He might have filed a new one or applied for a re-examination or appealed; and the existence of the rule is not an adequate excuse for conduct which the court considers as manifesting an abandonment of his invention. *Id.*
11. The invention of a planing-machine having a solid bed of no particular form or specified thickness, and not requiring to be constructed in one piece, is anticipated by a machine for cutting and planing light material, having in other respects the same devices and a solid bed adequate for the purposes for which it was intended. The fact that the bed of the latter is divided by a slit running longitudinally from one end to the other, yet arranged so as to constitute one bed, makes no difference. A machine remains the same in principle, although one or all of its constituents be enlarged and strengthened so as to perform heavier work. *Id.*
12. Section 4920, Revised Statutes, declares that the proofs of previous invention, knowledge, or use of the thing patented may be given upon notice in the answer of the defendant, stating the names of patentees, the dates of their letters-patent and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where or by whom it had been used. *Held*, that only the names of those who had invented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth. *Id.*
13. The court, upon the whole case, decides that said Woodbury was not the original and first inventor of the improvement for which he obtained said letters-patent No. 138,462, and that if he was, he had abandoned it to the public before they were issued. *Id.*
14. Letters-patent for a combination of old ingredients are infringed by substituting for one of its elements a mechanical equivalent which was well known to be such when they were granted. *Imhaeuser* v. *Buerk*, 647.
15. Letters-patent No. 48,048, granted June 6, 1865, to Jacob E. Buerk, for an improvement in watchman's time detectors, are valid, and are infringed by letters-patent No. 117,442, granted July 25, 1871, to Anton Meyer for an improvement in watchman's time checks. *Id.*

LICENSE. See *Constitutional Law*, 10; *Contracts*, 9–11.

LIEN. See *Equity*, 3, 4.

1. A railroad company in Ohio was reorganized under a statute of that State of April 11, 1861, the sixth section of which provides as fol-

LIEN (*continued*).

lows: "The lien of the mortgages and deeds of trust authorized to be made by this act shall be subject to the lien of judgments recovered against said corporation, — after its reorganization, — for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts, or liability as a common carrier thereafter made or incurred." The new company executed, April 1, 1864, a mortgage on its road to secure the payment of the principal and interest of certain bonds. Default having been made in the payment of the interest, a foreclosure suit was instituted, and a decree rendered whereunder a sale of the road was made, which was reported to the court Dec. 2, 1869, and on that day confirmed. The proceeds of the sale were less than the mortgage debt. A. was killed on the road June 22, 1866. His administrator, in a court in one of the counties through which the road passed, recovered, Feb. 28, 1871, judgment against the company for $5,000. In November, 1875, he became a party to the foreclosure suit, and claimed payment out of such proceeds. *Held*, 1. That by the law of Ohio a judgment is a lien from "the first day of the term at which the judgment is rendered," and as before that day the road had been sold and the sale confirmed, no lien by the judgment existed. 2. That there being no lien at law upon the road, there could be none in equity upon the fund arising from the sale. *Jeffrey* v. *Moran*, 285.

2. The act of the General Assembly of Missouri, approved Jan. 7, 1865, under which the county of St. Louis loaned its bonds to the extent of $700,000 to the Pacific Railroad Company, created, on its acceptance by the company and the county, an equitable lien or charge, in favor of the county, upon the earnings of the road, to the extent necessary to meet the interest upon the bonds as it accrues. The lien continues until the bonds shall be paid. *Ketchum* v. *St. Louis*, 306.

3. All purchasers of the property of the company, or of its bonds issued under a mortgage subsequently executed, are bound to take notice of that act. Where, in a suit to foreclose such a mortgage, the road is placed under the charge of a receiver, the lien or charge in favor of the county is enforceable not only against the fund in his hands, but against the purchaser under the decree, and against whomsoever may hold the road or have the custody of its earnings. *Id.*

4. Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person, whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation, binding upon the parties and all who, having notice, subsequently claim under the debtor an interest in the fund. *Id.*

5. A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him,

LIEN (*continued*).
and volunteers or claimants under him with notice of the agreement. *Id.*
6. Where by his covenant or otherwise a mortgagor is bound to insure the mortgaged premises for the better security of the mortgagees, the latter have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken out by him. *Wheeler* v. *Insurance Company*, 439.
7. This equity exists, although the covenant provides that in case of the mortgagor's failure to procure the insurance and assign the policy, the mortgagees may procure it at his expense. *Id.*
8. This equitable doctrine obtains in Louisiana. *Id.*
9. Where a contractor performs labor and furnishes materials upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company on its entire line of road to secure its bonds, — *Held*, that, on filing his claim within the time and in the mode prescribed by the statute, he has, as against the mortgagees, a paramount lien upon the entire road. *Brooks* v. *Railway Company*, 443.
10. A sub-contractor, between whom and the contractor a settlement had been made and the balance ascertained, filed within the required time in the clerk's office of the proper court his claim in due form against the contractor and the company, and, in a suit whereto they were all parties, judgment establishing his lien on the road was rendered. In a foreclosure suit subsequently brought against the company and him, the mortgagees objected to the validity of his lien because he had not also presented to the company that settlement certified by the contractor to be just. *Held*, that the objection was not well taken. *Id.*
11. A mechanic, pursuant to his contract with the owner of certain lots in the city of Washington, erected a row of buildings upon them. *Held*, that he did not lose his lien because his notice claimed it upon the property as an entirety, without specifically setting forth the amount claimed upon each building. *Phillips* v. *Gilbert*, 721.
12. Where a bill is filed to enforce the lien, and the latter is discharged by the owner's written undertaking, with surety approved by the court, that he will pay the amount recovered with costs, — *Held*, that the decree *in personam* for the amount due the mechanic can be taken only against the owner. *Id.*
13. The remedy of the mechanic against the surety is by an action at law upon the undertaking. *Id.*
14. The ruling in *Brooks* v. *Railway Company* (*supra*, p. 443), that work done by a contractor upon a part of a railroad then in process of construction entitles his lien, under the laws of Iowa, to precedence over that of a prior mortgage upon the entire road, reaffirmed. *Meyer* v. *Hornby*, 728.
15. The contractor was a stockholder in a construction company, which, when it placed on the market the bonds secured by the mortgage,

LIEN (*continued*).

gave a guaranty that the local subscriptions and grants would be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency. *Held*, that he was not thereby estopped from setting up his lien as against the mortgagee. *Id.*

16. If the holders of the bonds sustained any loss by reason of the guaranty, the company which gave it is liable in damages. *Id.*

LIMITATIONS, STATUTE OF. See *Bankruptcy; Specific Performance; Succession Tax.*

The statutes of Indiana provide that "an action for relief against frauds shall be commenced within six years," and that "if any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." A., who had recovered judgment in 1860 in a court of that State against B., brought suit in 1872, alleging that the latter, in 1858, in order to defraud his creditors, confessed judgments, incumbered his property, and in 1862 transferred his real and personal estate to sundry persons, who held the same in secret trust for him; that on being arrested in 1862, upon final process to compel the payment of A.'s judgment, he deposed that he was not worth twenty dollars, and had in good faith assigned all his property to pay his creditors; that A., believing the statement, and relying upon the representations of B., that C., his son-in-law, would with his own means purchase the judgment for fifty cents of the principal and interest, sold it in 1864 to C.; that he has since discovered that the money he received therefor belonged to B.; that the latter has now an indefeasible title to the property; and that said judgment has been entered satisfied. *Held*, that the Statute of Limitations commenced running when the alleged fraud was perpetrated, and that it is not avoided by a replication averring that B. fraudulently concealed the facts in the declaration mentioned, touching the incumbering or the conveying of the property, the confession of judgments, and his real ownership of the property, and that A. had no knowledge of them until a short time before the suit was brought. *Wood* v. *Carpenter*, 135.

LIS PENDENS.

1. Although by the words of article 355 of the Code of Practice of Louisiana, the exception of *lis pendens* is given only where the former suit is pending "before another court of competent jurisdiction," such an exception, where the former suit is pending in the same court, is within the equity of that article. *Fleitas* v. *Cockrem*, 301.
2. Where, therefore, the defendant files such an exception, — a former suit pending in the same court, — the plaintiff may be compelled to elect whether he will submit to judgment on the exception, or discontinue the former suit and pay the costs thereof. *Id.*
3. In an action on a promissory note for $5,000 and interest, the defend-

LIS PENDENS (*continued*).

ant appeared and filed an exception of *lis pendens*. Subsequently, on a supplemental petition praying therefor, an attachment against the defendant's property was issued upon the plaintiff's entering into bond for $3,200, as prescribed by the order of the court. The court denied the motion of the defendant to set aside the attachment, upon the ground that the amount of the bond was insufficient. The property, seized under the writ, was released upon the defendant's entering into bond for $9,100. The jury found for the plaintiff the amount of the debt and interest; the court rendered judgment against the defendant therefor, "with privilege upon the property attached, and with recourse on the principal and sureties on the bond, upon which the property attached was released." *Held*, that the court erred in rendering any other than a personal judgment against the defendant. *Id.*

LOTTERY. See *Constitutional Law*, 10, 12.

LOUISIANA. See *Attachment Bond; Lien*, 6–8; *Lis Pendens*.

LUNATIC, SALE OF HIS LANDS BY HIS GUARDIAN. See *Jurisdiction*, 8.

MANDAMUS. See *Land Department, Decisions of the Officers thereof*, 1.

1. This court will not by *mandamus* revise the action of inferior courts acting within the scope of their authority touching any matter about which they must exercise their judicial discretion. *Ex parte Railway Company*, 711.
2. A petition was presented for a *mandamus* to the Circuit Court of the United States for the District of Colorado in the matter of proceedings had subsequently to its receipt of the mandate ordered in *Railway Company* v. *Alling*, 99 U. S. 463. They are mentioned *supra*, pp. 715–717. *Held*, that the case is not one which calls for interposition by *mandamus*. *Id.*

MANDATE. See *Mandamus*, 2; *Practice*, 10.

MARRIED WOMAN, SEPARATE ESTATE OF.

1. Lands in Mississippi, belonging to a married woman, which she, at a stipulated rent, leased to her husband, who entered thereon and cultivated them in his own name and for his own benefit, are not, during the term, her plantation, within the meaning of the statute of that State, which enacts that all contracts of the husband and wife, or either of them, for supplies for her plantation, may be "enforced, and satisfaction secured out of her separate estate." *Bank of America* v. *Banks*, 240.
2. A contract for such supplies will not bind the separate property of the wife, unless she be the beneficiary of the cultivation, and they in fact are purchased for her account and benefit. *Id.*
3. A parol lease of lands in Mississippi for one year, made by a woman to her husband, is not invalid. *Id.*
4. The recital in a deed of trust of her separate estate, executed by her and

MARRIED WOMAN, SEPARATE ESTATE OF (*continued*).
her husband, that it is given to secure her indebtedness, evidenced by her and his notes, does not estop her from showing that they were given for supplies furnished for a plantation, which he cultivated in his name and for his benefit. *Id.*
5. Where lands in New Jersey, paid for out of the separate estate of a married woman, are conveyed to her, she is considered to be the owner of them, as if she were a *feme sole*. *Aldridge* v. *Muirhead*, 397.
6. Under the laws of that State, the separate property of a woman may, with her consent, be managed by her husband, without necessarily subjecting to the claims of his creditors it or the proceeds which by reason of his management arise therefrom. *Id.*

MASSACHUSETTS. See *Fire, Destruction of Buildings to prevent Spread of.*

MECHANICAL EQUIVALENT. See *Letters-patent*, 3, 4.

MECHANIC'S LIEN. See *Lien*, 9–14.

MINING AND WATER RIGHTS. See *Canal and Ditch Owners.*

MISSISSIPPI. See *Constitutional Law*, 10; *Married Woman, Separate Estate of*, 1–4; *Res Judicata*, 3.

MISSOURI. See *Lien*, 2, 3; *Municipal Bonds*, 16, 18–20.

MISSOURI, CONSTITUTION OF. See *Municipal Bonds*, 16.
By the Constitution and laws of Missouri, the Saint Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in Saint Louis and some adjoining counties; the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State. *Held*, that this adjustment of appellate jurisdiction is not forbidden by the Fourteenth Amendment of the Federal Constitution. *Missouri* v. *Lewis*, 22.

MONEYED CAPITAL. See *Taxation*, 3–5.

MONEYS PAID INTO THE TREASURY. See *Customs, Collector of.*

MORTGAGE. See *Evidence*, 1; *Lien*, 3, 9, 10, 14, 15.
1. A corporation of New York having authority to mortgage its property for the purpose of carrying on its business is not prohibited by the laws of that State from executing such a mortgage to secure the payment of money to be thereafter advanced. *Jones* v. *Guaranty and Indemnity Company*, 622.
2. A., as president of B., a corporation, applied to C. for a loan. The latter then advanced $50,000, taking therefor a note of B., payable to the order of D. & Co., — of which firm A. was a member, — and bearing their indorsement. A. also stipulated to deliver to C., B.'s mortgage on its real estate for $100,000, as security for said $50,000 and for any further loans from C. to B. The execution of the mortgage was assented to in writing by B.'s trustees and by A., who

MORTGAGE *(continued)*.

was its creditor to a large amount and the holder of nearly all of its capital stock. The mortgage describes the individual obligation of A. as the liability to be secured, but recites that its execution was authorized to secure a loan of $100,000; that A. had given to C. his personal bond in that sum to secure advances made as therein stipulated. It was conditioned for the payment by B. of the amount that might be due upon the instrument secured by it. The bond bears even date with the mortgage. It recites that it was given to cover any advances made or to be made to A. by C. to the amount of $100.000 or less, on condition that such advances and their payment should be indorsed thereon, as fixing the amount of indebtedness, for all of which certain premises that day conveyed by B. to C. by indenture of mortgage shall be liable. Upon the delivery of the bond and mortgage to C., B.'s note for said $50,000 was renewed, and the amount thereof indorsed on the bond as an advance of that date. The bond shows two other advances to A. of $25,000 each, for one of which a note of B. for that amount payable to his order, and duly indorsed, was delivered as collateral, and for the other a warehouse receipt for oil, given by B. to him. The receipt proved worthless, and the note was subsequently renewed. None of B.'s notes were paid, but the money advanced to A. was used for the benefit of B. *Held*, 1. That it was the debt of B. and not that of A. which was intended to be, and is, secured by the mortgage. 2. That parol evidence was admissible to show such intent. *Id.*

3. A mortgage of goods and chattels in the State of New York, which is not accompanied by an immediate delivery and followed by an actual and continued possession of them, is void as against the creditors of the mortgagors, subsequent purchasers, and mortgagees in good faith, if it be executed by a firm the members of which reside there, unless, pursuant to the statute, it be filed in the city or town where they respectively reside. *Stewart* v. *Platt*, 731.
4. A failure so to file it does not impair its validity as between the mortgagee and the mortgagors, or the assignee in bankruptcy of the latter. *Id.*
5. Where a controversy arose between the assignee in bankruptcy of the mortgagors, their execution creditors, and the mortgagee, touching the application of the fund in court derived from the sale of the personal property covered by a mortgage which was not so filed, — *Held*, that the creditors are entitled to payment, and that the residue of the fund, the same not being more than sufficient to satisfy the mortgage debt, belongs to the mortgagee, and is not chargeable with any expense incurred by the assignee in the execution of his trust. *Id.*

MORTGAGOR, COVENANTS BY. See *Lien*, 6–8.

MUNICIPAL BONDS. See *Lien*, 2, 3.

1. Pursuant to the provisions of an act of the General Assembly of Illinois, approved Feb. 28, 1867, and to the result of a popular election

MUNICIPAL BONDS (*continued*).

duly called, and held June 3, 1867, a township subscribed $50,000 to the capital stock of a railroad company, created under the laws of that State, and it issued its bonds in payment therefor. On Aug. 20, 1869, that company was consolidated with another in Indiana, the new company assuming another name, and, in harmony with the object of said act, providing for the construction of a continuous line of road from a point in Indiana to the initial point of the road in Illinois. An election held in the township, Oct. 12, 1869, for the purpose of ascertaining the sense of its people upon the proposition to subscribe, upon certain conditions, $25,000 for additional stock in aid of the construction and completion of the road of the consolidated company, resulted in favor of the subscription, which being made, bonds to that amount in the customary form, bearing date March 20, 1870, and signed by the supervisor and clerk, were issued in the name of the township, and delivered to the company. Each contains a recital that it is issued under and by virtue of a law of the State of Illinois, approved Feb. 28, 1867, and in accordance with the vote of the electors of said township, at the special election held Oct. 12, 1869, in accordance with said act; and it pledges the faith of the township for the payment of the said principal sum and interest as aforesaid. The twelfth section of the act of Feb. 28, 1867, declares that "to further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding $250,000." *Held*, 1. That the power of the township to subscribe to the capital stock of the company was not exhausted by the subscription first made after the election held June 3, 1867. 2. That under said section the power of the township to subscribe was limited in amount only. 3. That the consolidation of the company was authorized by the general statute of Illinois of Feb. 28, 1854. 4. That the power of the township to make the additional subscription was, in its essence, a right and privilege conferred upon the company chartered by the act of 1867, which, under the act of 1854, passed to the consolidated company. *Empire* v. *Darlington*, 87.

2. The court affirms its ruling in *Brooklyn* v. *Insurance Company* (99 U. S. 362), that a decree rendered in a county court in a suit against a railroad company and others, declaring that municipal bonds and coupons issued to the company are null and void, does not affect the holders of them who did not appear, and had only constructive notice of the suit. *Id.*

3. By the statutes of Illinois, municipal bonds payable to bearer are transferable by delivery, and the holder thereof can sue thereon in his own name. *Roberts* v. *Bolles*, 119.

4. The statute of that State of March 6, 1867, provides that the supervisor of a town, if a majority of the legal voters thereof voting at an election to be held for the purpose so authorized, shall subscribe for stock of a railroad company in the name of the town, and issue its bonds in

MUNICIPAL BONDS (*continued*).

payment therefor, and the fifth section declares that "no mistake in the giving of notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the bonds so issued, *provided* that there is a majority of the votes at such election in favor of such subscription." An application in due form for an election was signed by only twelve legal voters and tax-payers instead of twenty, and ten days' notice of the election instead of twenty given. The election was held at the specified time, and a majority of the electors of the town voting thereat favored the subscription. It was accordingly made. An act of the legislature legalized the subscription, and the bonds were issued. *Held*, that, independently of that act, the bonds are not, in the hands of a *bona fide* purchaser, rendered invalid by reason of the departure from the statutory provisions touching the application for, and the notice of, the election. *Id.*

5. *Williams* v. *Town of Roberts* (88 Ill. 1), decided three years after the judgment now under review was rendered, is not accepted by this court as conclusive against the validity of the bonds; for the Supreme Court of Illinois, while holding the election to be void, does not refer to said sect. 5, nor to the precise question upon which their validity is sustained here. *Id.*

6. That decision would be an authority in point if it declared that said sect. 5 is in conflict with the Constitution of the State, or that the defects in the application and notice are not mere mistakes, within the meaning of the said statute of March 6, 1867. *Sed quære*, would it be conclusive here. *Id.*

7. *Brooklyn* v. *Insurance Company* (99 U. S. 362) cited and approved. *Id.*

8. Under the statutes of Congress (12 Stat. 239 and 15 id. 300) the legislative assembly of Dakota meets biennially, and no one session thereof can exceed forty days. That assembly met Dec. 5, 1870, and after continuing in session every day, Sundays excepted, until Jan. 13, 1871, adjourned without day. The acting governor convened it April 5, 1871, when, after organizing, it passed, among other laws, one entitled "An Act to enable organized counties and townships to vote aid to any railroad, and to provide for payment of the same." In strict conformity to its provisions, the electors of a county voted to donate a specific sum to a certain railroad company. Congress, by an act approved May 27, 1872 (17 id. 162), disapproved and annulled said territorial act, but provided that the vote of aid for the construction of the main stem of the road of the company should not be impaired, and that the company was a valid corporation. The company complied with the requirements of Congress by giving for the aid so voted an equal amount of stock to the county, and the latter issued its bonds therefor. In an action brought by a *bona fide* holder of them to recover certain instalments of interest, — *Held*, that, independently of the questi[illegible] f authority to convene that extra session, or of the validity of the laws enacted thereat, the bonds are binding on the county, inasmuch as the act of Congress is

MUNICIPAL BONDS (*continued*).
equivalent to a direct grant of power to issue them. *National Bank* v. *County of Yankton*, 129.

9. The bonds of "the inhabitants of the township of Pompton, in the county of Passaic" and State of New Jersey, for $1,000 each, bearing date Jan. 1, 1870, issued by the commissioners appointed for that township, and reciting that they are issued in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled "An Act to authorize certain townships, towns, and cities to issue bonds and take the bonds of the Montclair Railway Company," are valid in the hands of a *bona fide* purchaser for value before maturity. *Pompton* v. *Cooper Union*, 196.

10. The act of the legislature, approved March 18, 1867, incorporating that company authorized it to construct a railway from the village of Montclair, in the township of Bloomfield, to the Hudson River, at one or the other of certain designated points, and also to construct a branch thereof in said township, and to "extend the said railway into the townships of Caldwell and Wayne." By the act of April 9, 1868, provision was made for the appointment of commissioners for any township, town, or city, "along the routes of the Montclair Railway Company, or at the termini thereof," who, upon the performance of certain precedent conditions, were authorized to issue its bonds, dispose of the same, and invest the proceeds thereof in the bonds of said company. By a supplemental act, approved March 16, 1869, the company was authorized to extend its railway from any point thereon to any point in the township of West Milford, provided that said act should not be construed as extending the operation of said act of 1868 to any township, town, or city through or to which the said railway was not authorized to be made before the passage of said act of 1869. When the bonds were disposed of by the commissioners no route of the road west of Montclair had been surveyed. A survey which commenced at that village and extended to a point in the southern part of Wayne Township was filed April 6, 1870. Another survey was filed June 9, and in accordance therewith the road was built. It began at the terminus last mentioned, crossed the line between Wayne and Pequannock Townships; then proceeded to the line between Pequannock and Pompton (the latter being a parallelogram), and after traversing Pompton diagonally about two-thirds of its length, crossed its west line into West Milford, and thence proceeded in that township to the boundary line between New Jersey and New York. Thus, though Pompton did not get a terminus on its southwest line, as originally contemplated, it got for the same consideration the length of the road within its territory and the extension beyond its limits. *Held*, 1. That the commissioners being the sole judges upon the question of disposing of the bonds, their decision was conclusive. 2. That the fact that under the act of 1869, Pompton, instead of being a terminal township, became thereafter a township "along the route of the road," cannot affect the previously vested rights of a *bona fide* transferee of the

MUNICIPAL BONDS (*continued*).

securities. 3. That the act of 1869 was in effect a legislative declaration that the authorized and not the actual routes were those intended by the act of 1868. *Id.*

11. Under the laws of New Jersey, the Board of Chosen Freeholders of the County of Hudson had no authority, Dec. 14, 1876, to purchase lands whereon to erect a court-house, and to issue in payment therefor bonds payable out of the amount appropriated and limited for the fiscal year commencing Dec. 1, 1877. *Crampton* v. *Zabriskie*, 601.

12. After the Supreme Court of New Jersey had decided that the resolution adopted by the board for such purchase and payment was illegal, A., the vendor of the lands, brought an action on said bonds against the board. Thereupon certain resident tax-payers filed their bill, praying that A. be restrained from prosecuting that action or one to recover the value of the lands; that the board be enjoined from paying the bonds, and directed to convey the lands to A., and that he be required to accept a deed therefor. *Held*, that they were entitled to the relief prayed for. *Id.*

13. An act authorizing a town to borrow money for aiding in the construction of a railroad provides that "all moneys borrowed under the authority of this act shall be paid over to the president and directors of such railroad company (now organized, or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850) as may be expressed by the written assent of two-thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing, and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga or the New York and Erie Railroad." *Held*, that the tax-payers were not thereby required to "express" (that is, designate) the company by name; and that an assent authorizing the money to be paid "to the president and directors of a railroad company organized according to the requirements of the general railroad laws for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga Railroad and passing through the city of Auburn," was sufficient. *Scipio* v. *Wright*, 665.

14. A prerequisite to the issue of bonds by town authorities, that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office of the county, is intended as a protection against a town debt rather than against the form it might assume after it had been incurred, or when the security for it should be given. And where such prerequisite was coupled with authority to subscribe to the capital stock of a railroad company a sum equal to the amount of the bonds issued, — *Held*, that they are not invalid because not issued until after the date when the assessment-roll referred to was by law required to be completed, the assent having

MUNICIPAL BONDS (*continued*).

been filed, and the subscription for the stock of the company made, the bonds executed and some of them sold and the proceeds paid on account of the subscription before that date. *Id.*

15. A statute of New York authorizing towns to subscribe to the capital stock of railroad companies and issue bonds for the purpose of borrowing money therefor, prescribed the manner in which the power conferred should be exercised. It appearing to be the settled construction given by the courts of that State to this statute, under which certain bonds now in suit were issued, and to other similar statutes, that they do not authorize an exchange of bonds for shares of stock, and that a purchaser, with notice that such a disposition of the bonds was made by the town officers, cannot recover in a suit brought upon them, this court follows this construction of the State statute. *Id.*

16. The court reviews the legislation and judicial decisions of Missouri, whereby the constitutionality of an act of the General Assembly, entitled "An Act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868, was recognized and affirmed long after the county authorities had issued, pursuant to its provisions, the bonds whereon this suit was brought. The court in this case adheres to its ruling in accordance with those decisions, as announced in *County of Cass* v. *Johnston* (95 U. S. 360), although the Supreme Court of Missouri has since declared that act to be in conflict with sect. 14, art. 11, of the Constitution, adopted by that State in 1865. *Douglass* v. *County of Pike*, 677.

17. Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the State as they were then construed by her highest court; and in a case involving those rights this court will not be governed by any subsequent decision in conflict with that under which they accrued. *Id.*

18. The act of the General Assembly of Missouri, entitled "An Act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, applies to bonds issued under the act approved March 23, 1868, commonly known as "The Township Aid Act." *Anthony* v. *County of Jasper*, 693.

19. The said act of March 30, 1872, declares that before a municipal bond thereafter issued shall obtain validity or be negotiated, it shall be presented to the State auditor, who shall register it and certify by indorsement that all the conditions of the laws and of the contract under which it was ordered to be issued have been complied with. *Held*, that, unless the bonds are so indorsed, a holder of them cannot maintain an action thereon. *Id.*

20. A township in Missouri voted to subscribe for stock in a railroad company. The proper county court, March 2, 1872, made the subscription, and, June 4, ordered that the bonds in payment therefor be issued. They were issued in October following, but bore date

MUNICIPAL BONDS (*continued*).

the day of the subscription. They were sealed with the seal of the court, and signed by the clerk, and by A. as presiding justice, although the latter did not become such until October. Neither the county court nor the other justice thereof consented to A.'s act. The bonds were not registered, nor was the certificate of registration required by said act of March 30 indorsed thereon. In a suit by B., a holder for value, upon the bonds, — *Held*, 1. That he was charged with notice that A. was not presiding justice at the time they bear date. 2. That the bonds being signed by A. was equivalent to notice that they were not in fact issued before the passage of said act, and that they are consequently void. *Id.*

21. *Town of Weyauwega* v. *Ayling* (99 U. S. 112) distinguished. *Id.*

MUNICIPALITIES. See *Constitutional Law*, 2–5.

NATIONAL BANKS. See *Constitutional Law*, 1; *Taxation*, 3–5.

A. made his promissory note to his own order, duly indorsed it to the order of B., and delivered it to a national bank. The latter negotiated it to B., and applied the proceeds thereof to the cancellation of a prior debt of A. With the knowledge and consent of the president and cashier, who were also directors, but without any notice to or authority from the board, C., one of the directors and vice-president of the bank, guaranteed, at the time of the transaction, the payment of the note at maturity by an indorsement thereon to that effect in the name and on behalf of the bank. The note was duly protested for non-payment, and the bank notified thereof. B. brought this action against the bank. *Held*, 1. That the bank was not prohibited by law from guaranteeing the payment of the note. 2. That it is to be presumed that C. had rightfully the power he assumed to exercise, and the bank is estopped to deny it. 3. That the bank by its retention and enjoyment of the proceeds of the note, rendered the act of C. as binding as if it had been expressly authorized. *People's Bank* v. *National Bank*, 181.

NEW JERSEY. See *Married Woman, Separate Estate of*, 5, 6; *Municipal Bonds*, 9–12; *Res Judicata*, 2.

NEW TRIAL. See *Feigned Issue; Practice*, 12.

NEW YORK. See *Corporations*, 7; *Mortgage*, 1–4.

NON-NEGOTIABLE DEMANDS.

1. Except where the original owner of a non-negotiable demand which he has indorsed in blank is estopped from asserting his original claim thereto, the purchaser thereof from any party other than such owner takes only such rights as the latter has parted with. *Cowdrey* v. *Vandenburgh*, 572.

2. *Semble*, that if the pledgee of such a demand writes a formal assignment to himself over the blank indorsement made by the pledgor and in that form sells it to a third party for value, the pledgor is, as against such third party, estopped from asserting ownership thereto. *Id.*

NOTICE. See *Municipal Bonds*, 20.

OHIO. See *Taxation*, 5.

In Ohio, a judgment is, from the first day of the term of the court at which it was rendered, a lien upon the lands of the defendant. *Jeffrey* v. *Moran*, 285.

OPINION, DISAGREEMENT IN, CERTIFICATE OF. See *Practice*, 1.

OPIUM. See *Customs Duties*, 6.

OREGON. See *Donation Act; Land Department, Decisions of the Officers thereof*, 6.

PAROL EVIDENCE. See *Contracts*, 8; *Mortgage*, 2.

PAROL LEASE. See *Married Woman, Separate Estate of*, 3.

PARTIES. See *Deed, Reformation of*, 2; *Equity*, 4.

PARTITION OF LANDS. See *Lands, Partition of, by Trustee.*

PATENT OFFICE. See *Letters-patent*, 10.

PENALTY. See *Succession Tax; Taxation*, 7, 8.

PERSIA, TREATY WITH.

The act of June 6, 1872 (17 Stat. 232; Rev. Stat. 2501), imposing on opium, a product of Persia, if it be imported to the United States from a country west of the Cape of Good Hope, an additional duty of ten per cent *ad valorem*, is not in conflict with the treaty between the United States and that power. 11 Stat. 709. *Powers* v. *Comly*, 789.

PLEADING. See *Equity*, 2; *Frauds, Statute of.*

1. Salvors cannot in the same libel proceed *in rem* against a vessel and *in personam* against the consignees of her cargo. *The "Sabine,"* 384.
2. A party claiming a credit which by reason of his laches was not presented to the accounting officers of the treasury and disallowed in whole or in part by them, cannot set it up in an action brought by the United States against him for the recovery of a debt. *Railroad Company* v. *United States*, 543.
3. Where it appears by the complainant's bill that the remedy is barred by lapse of time, or that by reason of his laches he is not entitled to relief, the defendant may by demurrer avail himself of the objection. *National Bank* v. *Carpenter*, 567.

PLEDGE. See *Executor; Non-negotiable Demands.*

POWERS. See *Lands, Partition of, by Trustee.*

1. A power to "sell and exchange" lands includes the power to make partition of them. *Phelps* v. *Harris*, 370.
2. Where a testator devising land in Mississippi appointed a trustee with power "to depose of all or any portion of it" that might fall to the devisees, and "invest the proceeds in such manner as he might think

POWERS (*continued*).

proper for their benefit," this court, without laying down as a general rule that the words "dispose of" import a power to make partition, holds, in view of the opinion of the Supreme Court of Mississippi on the precise point in a case between the same parties, although not announced under such conditions as made it *res judicata*, that the trustee had power to make partition. *Id.*

PRACTICE. See *Causes, Removal of*, 3; *Exceptions, Bill of; Feigned Issue; Frauds, Statute of; Supersedeas.*

1. Where, upon an examination of the whole record of a civil suit or proceeding, it appears that the opinions of the judges of the Circuit Court were not actually opposed upon any question of law material to the determination of the cause, and the amount in controversy is not sufficient to give this court jurisdiction, the writ of error will be dismissed, even though a disagreement in opinion be certified in form. *Railroad Company* v. *White*, 98.
2. No error is committed in refusing a prayer for instructions consisting of a series of propositions, presented as an entirety, if any of them should not be given to the jury. *Worthington* v. *Mason*, 149.
3. When error is assigned upon the instructions given and those refused, the bill of exceptions must set forth so much of the evidence as tends to prove the facts, out of which the question is raised to which the instructions apply. *Id.*
4. Where, therefore, the bill of exceptions embodies only the instructions given and those refused, this court will not reverse the judgment. *Id.*
5. Where an action has been removed from a State court to the Circuit Court, the latter may, in accordance with the State practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. *West* v. *Smith*, 263.
6. In an action to recover the balance alleged to be due upon certain yarn spun for, and from time to time delivered to, the defendant, for all of which he had paid, except the last lot, he, by way of recoupment, claimed damages because all the yarn was not of the stipulated size. To prove this, he put in evidence a letter of the plaintiff wherein he, at the instance of the defendant, deducted from one of his bills five cents per pound on a specified quantity, and stated the balance. The plaintiff, being examined, was then asked by his counsel whether he accepted defendant's proposition to make the deduction on that lot because he admitted that the yarn was not according to contract, or to settle a controversy. He answered that it was to avoid a controversy. *Held*, that the answer was properly admitted. *Id.*
7. An appeal will not be dismissed upon the ground that the decree from which it was taken was rendered by consent; but no errors will be considered here which were in law waived by such consent. *Pacific Railroad* v. *Ketchum*, 289.

PRACTICE (*continued*).

8. The court announces its determination to insist upon a strict observance by counsel of all rules intended to facilitate the examination of causes, especially those submitted. *School District* v. *Insurance Company*, 472.
9. The submission of a cause under the twentieth rule set aside for non-compliance with paragraph 4, subdivision 3, of Rule 21, which provides that "when a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length," either in or with the brief. *Id.*
10. The Circuit Court, when its decree is affirmed and the mandate filed there, must record the order of this court and proceed with the execution of the decree. *Durant* v. *Essex Company*, 555.
11. For all the purposes of the case, a judgment of affirmance here by a divided court is as effectual as if all the judges had concurred therein. *Id.*
12. Where the judgment below was entered properly, this court will not remand the case for a new trial, because of the verbal mistake of the clerk in using a superfluous word in entering the verdict. As the verdict was amendable in the court below, the amendment will be regarded as made. *Shaw* v. *Railroad Company*, 557.
13. Where it appears by the complainant's bill that the remedy is barred by lapse of time, or that by reason of his laches he is not entitled to relief, the defendant may by demurrer avail himself of the objection. *National Bank* v. *Carpenter*, 567.
14. Under the rules of equity practice established by this court, the complainant is not entitled, as a matter of right, to amend his bill after a demurrer thereto has been sustained; but the court may, in its discretion, grant him leave to do so upon such terms as it shall deem reasonable. *Id.*
15. The order refusing him such leave cannot be reviewed here, if the record does not show what amendment he desired to make. *Id.*
16. Where the defendant in error moved to dismiss a writ sued out by three partners, two of whom had previously received their discharges in bankruptcy, on the ground that the assignee alone could prosecute it, the court grants the application of the latter to be substituted as a plaintiff in error. *Gates* v. *Goodloe*, 612.
17. *Semble*, that the partner against whom no bankruptcy proceedings were instituted might have sued out the writ, using, if necessary, the names of all the parties against whom the judgment had been rendered. *Id.*
18. The objection cannot be made for the first time in this court, that the report of a referee finds certain facts inferentially and not directly. *Lumber Company* v. *Buchtel*, 633.
19. *Semble*, that the finding of a referee should have the precision of a special verdict, specifying with distinctness the facts, and not leaving them to be inferred. *Id.*
20. In an action upon a life policy, where the defence is set up that some of the answers to the interrogatories contained in the application for

PRACTICE (*continued*).
insurance are untrue, and the evidence is conflicting, the court should not direct the jury to find for the defendant. *Moulor* v. *Insurance Company*, 708.
21. The Supreme Court of the District of Columbia affirmed a decree and allowed an appeal therefrom which was not perfected. A motion, whereof the adverse party had due notice, was thereupon made and entered on the minutes to vacate the affirmance and grant a reargument. Not having been acted upon, it was, by the general course and practice of the court, continued as unfinished business. *Held*, 1. That the motion prolonged the suit, and the parties thereto were in court until it should be finally disposed of. 2. That under such circumstances it was competent for the court at the ensuing term to grant the motion, vacate the allowance of an appeal to this court, and pass a decree of reversal. *Goddard* v. *Ordway*, 745.
22. Where, in a suit alleging the infringement of the complainant's letters-patent, and praying an account of profits, a decree, passed in his favor for a certain sum, was on appeal affirmed here, with "interest until paid at the same rate per annum that *similar* decrees bear in the courts of the State," and that rate on money decrees is six per cent, — *Held*, that the decree so affirmed bears interest at that rate. *Railroad Company* v. *Turrill*, 836.

PRE-EMPTION. See *Canal and Ditch Owners; Des Moines River Grant*, 1; *Land Department, Decisions of the Officers thereof*, 5, 6.

PRESUMPTION. See *Corporations*, 3, 4; *National Banks*.

PRINCIPAL AND AGENT.
1. A principal is, in law, affected with notice of all facts, of which notice can be charged upon his attorney. *Smith* v. *Ayer*, 320.
2. Where a party who discloses his principal, and is known to be acting as an agent, enters as such into a contract, he is not liable thereon in the absence of his express agreement to be thereby bound. *Whitney* v. *Wyman*, 392.

PRIVATE LAND CLAIMS.
1. Where a petition was filed under the eleventh section of an act entitled "An Act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri" (12 Stat. 85), praying for the confirmation of title to a tract of land in Louisiana, and it appears that the grant, as the same is alleged in the petition, was not surveyed before the treaty of cession, and that it furnishes no means whereby its location or extent can be determined, — *Held*, that the petition was properly dismissed. *Dauterive* v. *United States*, 700.
2. *United States* v. *D'Auterieve* (14 How. 14), in which the same grant was under consideration, cited and approved. *Id.*
3. The concession of certain lands now within the State of Alabama, confirmed to Nicholas Baudin Sept. 15, 1718, by the then governor

PRIVATE LAND CLAIMS (*continued*).
of Louisiana (*supra*, p. 798), was a complete grant to the donee, and vested in him a perfect title to them. *Trenier* v. *Stewart*, 797.
4. The court reaffirms its rulings in *Scull* v. *United States* (98 U. S. 410) as to the nature of the title whereon a suit can, under sect. 11 of the act of June 30, 1860 (12 Stat. 85), be maintained against the United States for lands claimed under a grant from the French or the Spanish authorities in Louisiana. *United States* v. *Clamorgan*, 822.
5. The claim in this cause, founded upon an alleged grant made at St. Louis by Trudeau, lieutenant-governor, March 3, 1797, examined, and *held* not to be within the provisions of that section. *Id.*

PRIVATE PROPERTY TAKEN FOR PUBLIC USE. See *Court of Claims*, 1.
If, under claim that they belong to the government, an officer seizes for the use of an Indian agency buildings owned by a private citizen, no implied obligation of the United States to pay for the use and occupation of them is thereby raised. *Langford* v. *United States*, 341.

PRIZE.
On the night of Oct. 7, 1864, the rebel steamer "Florida" was captured in the port of Bahia, Brazil, by the United States steamer "Wachusett," and brought thence to Hampton Roads, where, by a collision, she was sunk. The United States disavowed the act of the captain of the "Wachusett" in making the capture. He libelled the "Florida" as a prize of war. *Held*, that the libel was properly dismissed. *The "Florida,"* 37.

PROBATE. See *Evidence*, 1.

PUBLIC LANDS. See *Land Department, Decisions of the Officers thereof*, 2–7.
1. A tract of public land which has been sold by the proper officer of the United States, and the purchase-money therefor paid, is not subject to entry while the sale continues in force. *Simmonds* v. *Wagner*, 260.
2. A party in possession of lands, holding an uncancelled certificate of the register of the land-office within whose district they are situate, showing that full payment has been made for them, was sued in ejectment by the party who subsequently entered them, and obtained a patent therefor. *Held*, that the plaintiff is not entitled to recover. *Id.*

RAILROAD COMPANIES, CONSOLIDATION OF. See *Municipal Bonds*, 1.

RAILROAD COMPANIES, SUBSCRIPTION TO CAPITAL STOCK OF. See *Municipal Bonds*, 1, 13–15.

RAILROADS. See *Lien*, 1–3, 9, 10, 14–16.

1. A lease by a railroad company of all its road, rolling-stock, and franchises, for which no authority is given in its charter, is *ultra vires* and void. *Thomas* v. *Railroad Company*, 71.
2. The ordinary clause in the charter authorizing such a company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads confers no authority to lease its road and franchises. *Id.*
3. The franchises and powers of the company are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration for granting them. A contract by which the company renders itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation, without the consent of the State, violates its charter, and is forbidden by public policy. It is, therefore, void. *Id.*
4. The fact that the legislature, after such a lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity. *Id.*
5. Where a lease of this kind for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle that executed contracts, originally *ultra vires*, shall stand good for the protection of rights acquired under a completed transaction. *Id.*

REBELLION, THE.

1. The court reaffirms the ruling in *The William Bagaley* (5 Wall. 377), that a resident of a section in rebellion should leave it as soon as practicable, and adhere to the regular established government; and furthermore holds that one who, abandoning his home, enters the military lines of the enemy, and is in sympathy and co-operation with those who strive by armed force to overthrow the Union, is, during his stay there, an enemy of the government, and liable to be treated as such, both as to his person and property. *Gates* v. *Goodloe*, 612.
2. When in 1862, at a time when there was no such substantial, complete, and permanent military occupation and control of Memphis as has been held sometimes to draw after it a full measure of protection to persons and property, and when no pledge had been given which would prevent the general commanding the forces of the United States from doing what the laws of war authorized, and his personal judgment sanctioned as necessary for and conducive to the successful prosecution of the war, — *Held*, that he had the right to collect rents belonging to a citizen who had gone and remained within the lines of the enemy, and hold them subject to such dispo-

REBELLION, THE (*continued*).
sition as might thereafter be made of them by the decisions of the proper tribunals. *Id.*
3. A lessee who was dispossessed by the military authorities under such circumstances, and deprived of the use and control of the demised premises, is discharged from liability to his lessor for rent accruing during the period of such dispossession. *Id.*

RECORD. See *Feigned Issue*, 2.
A statement in the record that an issue was "called for trial by the court, the jury having been waived in writing," is, in the absence of any thing to the contrary, conclusive that the requisite agreement for such a trial was made. *Fleitas* v. *Cockrem*, 301.

REFEREE. See *Estoppel*, 3; *Practice*, 18, 19.

REISSUED LETTERS-PATENT. See *Letters-patent*, 1, 2.

REMOVAL OF CAUSES. See *Causes, Removal of.*

RES JUDICATA. See *Causes, Removal of*, 3, 4.
1. A judgment in assumpsit, brought by a husband and wife, on a contract by a carrier of passengers to carry her safely, for injuries to her while being carried, is a bar to another action of assumpsit on the same contract, by the husband alone, to recover for the same injuries. *Pollard* v. *Railroad Company*, 223.
2. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in States where, as in New Jersey, the husband, in such an action, may by statute add claims in his own right to those of his wife. *Id.*
3. A., although out of possession of certain lands in Mississippi, filed his bill under a statute of that State to remove a cloud upon his title to them. The question of title was directly raised and litigated by the parties. The court being of opinion that he was not entitled to any relief in the premises, dismissed the bill. A. thereupon brought ejectment against B., the defendant in the former suit. *Held*, that the decree did not render the main controversy *res judicata*, as the court merely decided in effect that the bill would not lie. *Phelps* v. *Harris*, 370.
4. A. filed his bill claiming that he, as a creditor of a commercial firm, all the members of which were insolvent, had a prior lien or privilege upon the partnership property which had been transferred by them in payment of their individual debts, and seeking to subject that property to the payment of his debt. The bill, on a final hearing upon the pleadings and proofs, was dismissed. A. thereupon commenced a suit for the same cause of action against the same parties, alleging, in addition to the matters set forth in his former bill, that he had recovered a judgment at law against the partnership for the debt, and that an execution issued thereon had been returned *nulla bona*. *Held*, that the former decree is as *res judicata* a bar to the suit. *Case* v. *Beauregard*, 688.

REVISED STATUTES OF THE UNITED STATES.

Sect. 5597 of the Revised Statutes saves all rights which had accrued under any of the acts repealed by sect. 5596. *Bechtel* v. *United States*, 597.

The following sections referred to and explained: —

Sect. 1000. See *Supersedeas*, 1.
Sect. 2501. See *Customs Duties*, 6; *Persia, Treaty with.*
Sect. 2503. See *Customs Duties*, 1.
Sect. 2504. See *Customs Duties*, 1.
Sect. 3218. See *Internal Revenue, Collector of*, 1.
Sect. 3413. See *Constitutional Law*, 1; *Taxation*, 1.
Sect. 3425. See *Evidence*, 3.
Sect. 4920. See *Letters-patent*, 12.

SAINT LOUIS COURT OF APPEALS. See *Missouri, Constitution of.*

SALE. See *Executor; Public Lands*, 1.

SALVAGE.

Salvors cannot in the same libel proceed *in rem* against a vessel and *in personam* against the consignees of her cargo. *The "Sabine,"* 384.

SEPARATE ESTATE. See *Married Woman, Separate Estate of.*

SET-OFF. See *Claims against the United States; Internal Revenue, Collector of*, 1, 3.

SETTLEMENT.

An executor's settlement of his accounts, although adjudicated by the proper court, binds only the parties thereto. *Butterfield* v. *Smith*, 570.

SOLICITOR, ASSENT OF, TO A DECREE. See *Appeal*, 3.

SOLICITOR, PURCHASE BY. See *Judicial Sale.*

SPECIAL VERDICT. See *Practice*, 19.

SPECIFIC PERFORMANCE.

A. and B. in November, 1846, entered into an agreement under seal, providing for the settlement of long standing and disputed accounts. A balance from B. to A. was ascertained, and the mode of payment and security agreed upon. A. released property of B. from the lien of judgments. B. among other things stipulated that he would obtain partition of certain lands wherein he had an undivided interest, and convey in fee the part assigned to him in severalty to A. at such price as should be adjudged by three appraisers, one to be appointed by A., one by B., and one by the other two. Such price to be credited on the judgments held by A. against B., and that the latter would give good security for the balance remaining due. B. died in 1849. There was no partition until 1866, when it was effected by his devisees, a fact not known to A. until 1872. They have made to A. no conveyance of the part of said lands assigned to them in severalty.

SPECIFIC PERFORMANCE (*continued*).

A. filed his bill in 1876, alleging that he had performed all the stipulations on his part to be performed, and that $40,000 of the original debt with accruing interest remains unpaid, and praying for such a conveyance, for the ascertainment of the balance under the order of the court, and for general relief. The devisees demurred. *Held*, 1. That upon the case made by the bill A.'s remedy was not barred by the lapse of time. 2. That A. having under the agreement parted with rights, and B. received value, the consideration of which was in part the stipulation concerning the lands, the agreement for the conveyance can be specifically enforced, and the court will, if it be necessary, provide a mode for ascertaining the value of the lands. *Gunton* v. *Carroll*, 426.

STATE COURTS, JURISDICTION OF. See *Constitutional Law*, 2–5.

STATE STATUTES, CITATION OF. See *Practice*, 8, 9.

STATUTE OF FRAUDS. See *Frauds, Statute of.*

STATUTE OF LIMITATIONS. See *Limitations, Statute of.*

STATUTES, CONSTRUCTION OF.

1. Statutes are not to be construed as altering the common law, or as making any innovation therein, further than their words import. *Shaw* v. *Railroad Company*, 557.
2. The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment by legislative enactment. *Douglass* v. *County of Pike*, 677.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and explained: —

1841. Sept. 4. See *Des Moines River Grant*, 1, 3, 4.
1846. Aug. 8. See *Des Moines River Grant*, 1, 3, 4.
1850. Sept. 27. See *Donation Act*, 1; *Land Department, Decisions of the Officers thereof*, 6.
1853. March 2. See *Admiralty.*
1856. May 15. See *Des Moines River Grant*, 1.
1860. June 22. See *Private Land Claims*, 1.
1860. June 30. See *Private Land Claims*, 4.
1861. March 2. See *Customs Duties*, 3.
1861. March 2. See *Des Moines River Grant*, 3, 4; *Taxation*, 6.
1861. March 2. See *Municipal Bonds*, 5.
1862. July 12. See *Des Moines River Grant*, 3, 4.
1864. June 30. See *Contracts*, 4.
1864. June 30. See *Evidence*, 3.
1864. June 30. See *Succession Tax.*
1865. March 3. See *Cashier, Acts of.*

STATUTES OF THE UNITED STATES (*continued*).
1866. July 13. See *Internal Revenue*, 1.
1866. July 26. See *Canal and Ditch Owners*.
1867. Feb. 26. See *Customs, Collector of*, 1.
1869. March 3. See *Municipal Bonds*, 5.
1870. May 20. See *Lease*, 1.
1870. July 8. See *Letters-patent*, 10.
1871. March 3. See *Des Moines River Grant*, 5.
1872. May 27. See *Municipal Bonds*, 5.
1872. June 6. See *Customs Duties*, 6; *Persia, Treaty with*.
1875. Feb. 16. See *Feigned Issue*, 3.
1875. March 3. See *Jurisdiction*, 5.

STOCKHOLDERS, INDIVIDUAL LIABILITY OF.
1. Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgments, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties; although, by the terms of their subscriptions, the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than thirty per cent of the subscriptions. *Hatch* v. *Dana*, 205.
2. *Pollard* v. *Bailey* (20 Wall. 520) and *Terry* v. *Tubman* (92 U. S. 156) distinguished from the present case. *Id.*
3. Where a bank charter provides that on the failure of the bank "each stockholder shall be liable and held bound . . . for any sum not exceeding twice the amount of . . . his . . . shares," — *Held*, 1. That a suit in equity by or for all creditors is the appropriate mode of enforcing the liability incurred on such failure. 2. That one creditor cannot maintain an action at law against two stockholders. *Terry* v. *Little*, 216.
4. *Pollard* v. *Bailey* (20 Wall. 520) cited and approved. *Id.*

SUB-CONTRACTOR. See *Lien*, 10.

SUCCESSION TAX.
A., who died in October, 1846, devised his real estate to his daughter for life, with remainder in fee to her son B., should he survive her. She died in September, 1865. B. was duly notified to make the return required by sect. 14 of the Internal Revenue Act of June 30, 1864 (13 Stat. 226), and on his refusal to do so was summoned in June, 1867, to appear before the assessor of the proper district. He appeared and claimed "that the estate was not liable to assessment for a succession tax." Thereupon the assessor assessed a tax of one per cent upon the full value of the property, and added thereto a penalty of fifty per cent and costs, — all of which B., July 20, 1867, paid under protest to the collector. The Commissioner of Internal Revenue, to whom B. appealed, rendered a decision adverse to his

SUCCESSION TAX (*continued*).

claim, July 3, 1873. B. brought this action, June 24, 1875, against the collector to recover the amount so paid. *Held*, 1. That the action was not barred by the Statute of Limitations. 2. That the tax was properly assessed and the penalty erroneously imposed. *Wright* v. *Blakeslee*, 174.

SUPERSEDEAS. See *Supersedeas Bond, Liability of Parties thereto.*

1. Where an appeal has been taken to this court, the condition of the bond that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said court," meets all the requirements of sect. 1000, Rev. Stat. *Gay* v. *Parpart*, 391.
2. In such a case the court will not entertain a motion by the appellee to affirm the decree appealed from. *Id.*

SUPERSEDEAS BOND, LIABILITY OF PARTIES THERETO.

A., against whom a judgment in favor of B. was rendered in the District Court, sued out of the Circuit Court a writ of error which was a *supersedeas*, by his giving the requisite bond. The judgment having been affirmed, another bond for a *supersedeas* was executed and the cause removed here. The judgment of the Circuit Court was affirmed. The original judgment remaining unpaid, this action against the sureties to the first bond was brought. *Held*, 1. That their liability was fixed by the judgment of the Circuit Court, and was not diminished by the subsequent proceedings. 2. That they are not chargeable with the costs incurred by reason of those proceedings. 3. That the issue of an execution against A. was not essential to B.'s right to recover. *Babbitt* v. *Finn*, 7.

SUPREME COURT OF THE DISTRICT OF COLUMBIA, JURISDICTION OF. See *Equity*, 2.

SURETY. See *Lien*, 12, 13.

TAGGER'S TIN. See *Customs Duties*, 1.

TAXATION. See *Succession Tax.*

1. Sect. 3413 of the Revised Statutes enacts that "every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them." *Held*, that the tax thus laid is not on the notes, but on their use as a circulating medium. *National Bank* v. *United States*, 1.
2. *Veazie Bank* v. *Fenno* (8 Wall. 533) cited and approved. *Id.*
3. Although for purposes of taxation the statutes of a State provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares are assessed at their full value, is a violation of the act of Congress which prescribes the rule by which they shall be taxed by State authority. *Pelton* v. *National Bank*, 143.

TAXATION (*continued*).

4. In such case, on the payment or the tender of the sum which such shares ought to pay under the rule established by that act, a court of equity will enjoin the State authorities from collecting the remainder. *Id.*

5. The Constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property, according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital, and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the county boards. Throughout a large part of Ohio, including Lucas County, in which A., a national bank, is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The State board of equalization of bank shares increased the valuation of them to their full value. A. brought its bill against the treasurer of that county, praying that he be enjoined from collecting a tax wrongfully assessed on those shares. *Held*, 1. That the statute creating the board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing *all property* at its actual cash value, the operation of the equalizing board would work no inequality of taxation, and a statute cannot be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration. 2. That the rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with that Constitution, and works manifest injustice to the owners of bank shares. 3. That when a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power. 4. That the appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess. *Cummings* v. *National Bank*, 153.

6. This court adhering to the construction given by the Supreme Court of Iowa to the revenue laws of that State touching the time when lands located or entered under the laws of the United States, or purchased from the State, become taxable, *holds* that the lands, the title

TAXATION (*continued*).
whereto by the joint resolution of Congress approved March 2, 1861 (12 Stat. 251), passed to *bona fide* purchasers of that State, were not subject to taxation prior to the year 1862. *Litchfield* v. *County of Webster*, 773.

7. Where the State claimed adversely to the true owner a part of said lands, and there was a controversy whether the title to the remainder had passed from the United States, and, on that account, the proper authorities of the State gave notice to the parties in interest that no legal steps would be taken to enforce the collection of the taxes until the title should be adjusted, — *Held*, that the statutory interest, which is in the nature of a penalty, cannot be exacted for non-payment of them within the time prescribed by law, where the owner, on the adjustment of the title, offered to pay so much of them as was actually due, with interest thereon at the rate allowed by law for delay in the payment of ordinary debts, and his offer was refused. *Id.*
8. A court of equity has, under such circumstances, the power to grant relief by enjoining the collection of such statutory interest. *Id.*

TAX-PAYER, SUIT BY. See *Equity*, 1.

TENNESSEE. See *Constitutional Law*, 7.

TERNE PLATES. See *Customs Duties*, 1.

TERRITORY, ORGANIZATION OF A. See *Constitutional Law*, 6.
The statutes of Congress organizing a Territory within the jurisdiction of the United States is the fundamental law of such Territory, and as such binding upon the territorial authorities. *National Bank* v. *County of Yankton*, 129.

TIN IN PLATES. See *Customs Duties*, 1.

TOLL-BRIDGE. See *Georgia*.

TRADE.
1. The word "trade" in its broadest signification includes not only the business of exchanging commodities by barter, but that of buying and selling for money, or commerce and traffic generally. *May* v. *Sloan*, 231.
2. Where, to effect a settlement of all his indebtedness to B. and C., who each held a mortgage upon his lands and personal property, A. entered into an agreement in writing with them, containing sundry provisions, by one of which C. stipulated "not to interfere with any *bona fide* trades made by A., so far as any of the mortgaged property is concerned, provided the trades have been carried out in good faith and completed." *Held*, that a sale by A. to B. of a portion of the lands, which was known to C., and evidenced by an instrument under seal, was a trade within the meaning of the agreement. *Id.*

TRADE-MARKS.
1. Letters or figures affixed to merchandise by a manufacturer, for the purpose of denoting its quality only, cannot be appropriated by him

TRADE-MARKS (*continued*).
to his exclusive use as a trade-mark. *Manufacturing Company* v. *Trainer*, 51.

2. An injunction will not be granted at his suit to restrain another manufacturer from using a label bearing no resemblance to the complainant's, except that certain letters, which alone convey no meaning, are inserted in the centre of each, the dissimilarity of the labels being such that no one will be misled as to the true origin or ownership of the merchandise. *Id.*

TRAFFIC. See *Trade.*

TRIAL. See *Record.*

TRUST. See *Deed, Reformation of*, 1; *Equity*, 3; *Executor; Will.*
Whatever may be the terms creating a trust estate, its nature and duration are governed by the requirements of the trust. *Young* v. *Bradley*, 782.

TRUSTEE. See *Wife, Voluntary Settlement upon*, 3; *Will.*

ULTRA VIRES. See *Railroads.*

UNINCORPORATED ASSOCIATION, DEVISE TO. See *Charitable Bequests.*

VERDICT. See *Feigned Issue*, 1; *Practice*, 12.

VIRGINIA. See *Charitable Bequests.*

VOLUNTARY SETTLEMENT. See *Wife, Voluntary Settlement upon.*

WAIVER. See *Practice*, 7.

WASHINGTON TERRITORY, ADMIRALTY JURISDICTION OF THE COURTS OF. See *Admiralty.*

WIFE, VOLUNTARY SETTLEMENT UPON.

1. Unless existing claims of creditors are thereby impaired, a voluntary settlement of property made by a husband upon his wife is not invalid. *Jones* v. *Clinton*, 225.
2. The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of his voluntary transfer of it as a settlement upon her. *Id.*
3. The intervention of trustees, in order that the property may be held as her separate estate beyond his control or interference, though formerly held to be indispensable, is no longer required. *Id.*
4. His reservation of a power of revocation or appointment to other uses does not impair the validity or efficiency of the conveyance in transferring the property to her, to hold until such power shall be executed; nor does it tend to create an imputation upon his good faith and honesty in the transaction. *Id.*
5. Such a power does not, in the event of his bankruptcy, pass to his assignee. *Id.*

WIFE, VOLUNTARY SETTLEMENT UPON (*continued*)

6. Where property, conveyed to the wife under a valid settlement made by the husband, was by their joint act afterwards appropriated to the payment of one of his creditors, — *Held*, that subsequent creditors and his assignee in bankruptcy could not rightfully complain. *Stewart* v. *Platt*, 731.

WILL. See *Executor*.

A. died in 1867. By his last will and testament he devised his entire estate to B., in trust, first, to set apart a certain house and its contents, together with one-third of the net income of his estate, to his widow for her natural life; then to divide said estate into four equal parts, and allot one to his son C., another to the children of the latter, and the remaining two to his daughters D. and E. respectively; then, upon the death of said widow, to set apart to D. and E. the house occupied by her, the same being a charge against their respective shares of the estate; next to hold the shares of said D. and E., in trust, for their sole and separate use, free from the control of their husbands, during their respective natural lives; but in the event of either of them dying without issue her share should go to the children of C. The will further provided that B. should have the largest powers and discretion in taking charge of and managing the estate, and authorized him to have, hold, direct, and control the aforesaid trust property, according to his best judgment, and to sell and dispose of the same, or any parts thereof, from time to time, subject only to the aforesaid trusts, and as freely as A. could do if living; and also in all things to have the same powers, rights, privileges, benefits, advantages as A. might have, if living, in all and any contracts, bargains, agreements, companies, or other compacts to which he, A., was a party. By consent of the parties interested, no division or distribution of the estate was made. The widow died in 1868, C. in 1869, and D. and E. in 1870, both of the latter without issue. In 1871, B., as trustee, conveyed certain of the real estate to F. Thereupon C.'s children filed this bill to have the conveyance set aside as null and void, and for a decree entitling them to the possession of the premises. *Held*, 1. That at the time B. undertook to sell the property to F., the trust estate created in him by the will of A. had become extinct. 2. That his powers as trustee having ceased, his conveyance to F. was void. *Young* v. *Bradley*, 782.

WRIT OF ERROR. See *Jurisdiction*, 4; *Practice*, 16, 17.

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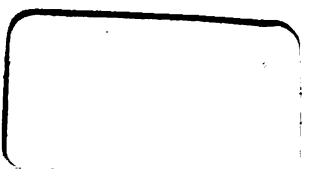
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